

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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JOHN HAMLET,

Plaintiff,

v.

9:17-cv-0939  
(GLS/TWD)

P. STOTLER et al.,

Defendants.

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APPEARANCES:

OF COUNSEL:

JOHN HAMLETT  
08-A-0598  
Plaintiff pro se  
Green Haven Correctional Facility  
P.O. Box 4000  
Stormville, New York 12582

HON. ERIC T. SCHNEIDERMAN  
Attorney General of the State of New York  
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The Capitol  
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**THERÈSE WILEY DANCKS**, United States Magistrate Judge

**ORDER AND REPORT-RECOMMENDATION**

This *pro se* civil rights action commenced pursuant to 42 U.S.C. § 1983 by Plaintiff John Hamlet, an inmate in the custody of the New York State Department of Corrections and Community Supervision (“DOCCS”), has been referred for Report and Recommendation by the Hon. Gary L. Sharpe, Senior U.S. District Judge, pursuant to 28 U.S.C. § 636(b) and Northern District of New York Local Rule (“L.R.”) 72.3(c).

Plaintiff filed his complaint in this *pro se* § 1983 action alleging retaliation in violation of his First Amendment rights and excessive force in violation of his rights under the Eighth Amendment, together with a motion for leave to proceed *in forma pauperis* (“IFP Application”), on August 24, 2017. (Dkt. Nos. 1, 2.) In a Decision and Order filed October 11, 2017, Judge Sharpe granted Plaintiff’s IFP Application, and upon initial review of the complaint in accordance with 28 U.S.C. § 1915(e)(2)(B) and 28 U.S.C. § 1915A(b), Judge Sharpe dismissed Plaintiff’s retaliation claims. (Dkt. No. 11 at 10.<sup>1</sup>) Plaintiff’s excessive force claim survived initial review. *Id.*

The matter is now before the Court on the motion of remaining Defendants Clinton Correctional Facility (“Clinton”) Sergeant Patrick Stotler (“Stotler”), and Clinton Corrections Officers Joseph Collins (“Collins”) and John Doe, for summary judgment pursuant to Federal Rule of Civil Procedure 56. (Dkt. No. 16.) Defendants seek summary judgment on the ground that Plaintiff failed to exhaust available administrative remedies before commencing the action. *See id.* Plaintiff has responded in opposition to the motion claiming that administrative exhaustion was unavailable to him and Defendants have filed reply papers. (Dkt. Nos. 20, 23.)

For reasons explained below, the Court recommends that Defendants’ motion for summary judgment on exhaustion grounds be denied.

## **I. BACKGROUND**

### **A. Alleged Use of Excessive Force**

Plaintiff alleges that on the morning of September 10, 2014, while he was housed at Clinton, he was stopped by multiple officers while on his way to an Inmate Liaison Committee

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<sup>1</sup> Page references to documents identified by docket number are to the numbers assigned by the CM/ECF docketing system maintained by the Clerk’s Office.

meeting as a representative of C-Block. (Dkt. No. 1 at 4.) Plaintiff claims to have been pat frisked and taken back to C-Block where he was placed in the shower area. *Id.* Plaintiff was thereafter placed in front of his cell while it was searched by Officer Stickney. (Dkt. No. 1 at 4.) Stickney came out of the cell with a weapon, which Plaintiff claims was planted, in his hand and called Defendant Stotler. *Id.* Stotler and Defendant Collins then escorted Plaintiff to the Clinic First Floor room to strip frisk him. *Id.* Defendant Doe, who identified himself to Plaintiff as “D. White-Cracker,” joined the frisk and all three of them allegedly assaulted Plaintiff. *Id.* Plaintiff claims that Collins punched him in the back in the area of his left kidney as Plaintiff was facing the wall with his legs spread and his hands on the wall, causing Plaintiff to defecate. *Id.* at 5. Stotler, Collins, and Doe punched Plaintiff in the back of the head. *Id.* Plaintiff was then taken down to the floor with his arms and legs and torso twisted in different directions by Stotler and Collins. *Id.* Plaintiff was then kicked, punched, and hit with a night stick multiple times by Doe and was kicked and punched by Stotler and Collins while Collins straddled him bending his wrist and fingers, twisting his ankle, and exposing his rib area to be hit by Doe. *Id.*

Plaintiff was lifted to his feet and Stotler left the room. *Id.* With feces on his backside, Plaintiff was told to strip and squat while the officers laughed. *Id.* Stotler returned with clean underwear and Plaintiff was permitted to clean himself. *Id.* Plaintiff was told to sit in the “boss chair” and was then choked, leaving him with a sore throat and jaw. *Id.* Collins threatened that if Plaintiff told the nurse anything they would kill him. *Id.*

Plaintiff was then taken to E-Block and placed in a cell for ten minutes before being taken to the Special Housing Unit (“SHU”). *Id.* According to Plaintiff, he sustained a lump on his head behind his ear and broken left rib in addition to the sore throat during the alleged assault by Defendants. *Id.*

**B. Grievances**

In his complaint, Plaintiff alleges he filed numerous grievances at Clinton after the alleged assault and sent complaints to the Clinton Superintendent. (Dkt. No. 1 at 6.) In his affidavit in opposition to Defendants' motion, Plaintiff states that he wrote his first of two grievances regarding the assault and lack of medical treatment on September 10, 2014, the day of the assault. (Dkt. No. 20-2 at 1.) The September 10, 2014, grievance, which is annexed to Plaintiff's affidavit in opposition, complained about the planting of a weapon in his cell and the subsequent assault by the "escorting Sergeant, Officer Collins, and another Unknown Named Officer." *Id.* at 4. Plaintiff also complained of being denied medical care despite likely having broken ribs and suffering from dizzy spells. *Id.* Plaintiff asked that he be moved for his safety and be provided a camcorder, that he be given medical treatment, and that the officers be punished. *Id.* Plaintiff stated he wanted to file criminal charges against Defendants. *Id.* The grievance indicates copies were sent to Richard Langone, Esq., Clinton Superintendent Racette, and DOCCS Commissioner Anthony Annucci. *Id.*

Plaintiff's second grievance, dated September 19, 2014, was more detailed regarding the retaliatory reasons for the alleged assault, the assault itself, injuries sustained by Plaintiff, and the lack of medical care for his injuries. *Id.* at 7. The grievance indicates that copies were sent to the New York State Commission of Correction and the Clinton County Sheriff's Office. *Id.* at 9. Plaintiff states in his affidavit that he gave the grievances to the corrections officers on rounds to pick up mail in SHU unit 14 where he was housed following the alleged assault, as was the procedure at Clinton. *Id.* at 1.

Plaintiff was transferred from Clinton to Southport Correctional Facility ("Southport") on September 30, 2014. (Dkt. Nos. 16-5 at 3; 16-9 at 3.) A week later, on October 7, 2014,

Plaintiff was transferred from Southport to Five Points Correctional Facility (“Five Points”). (Dkt. Nos. 16-9 at 3; 16-7 at 3.) On October, 24, 2014, while housed at Five Points, Plaintiff wrote to the Clinton Inmate Grievance Program (“IGP”) supervisor requesting a number for his September 10, 2014, grievance. (Dkt. No. 23-2 at 4.) Plaintiff wrote in the letter that he had filed a grievance with the IGP regarding the September 10, 2014, assault and had sent the Superintendent a copy. *Id.* He noted in the letter that an investigation had been started by the Inspector General but that he had not received a number for the grievance he filed. *Id.* Plaintiff copied Richard Langone, Esq., on the letter. *Id.*

In an October 30, 2014, memorandum, Clinton IGP Supervisor Christine Gregory (“Gregory”) wrote “[t]he last grievance on file for DIN# 08A0598 for the year 2014 was filed on 7/9/14. There is no grievance on file for you concerning an incident of 9/10/14.” *Id.* at 6. Plaintiff responded to Gregory’s memorandum on November 11, 2014. *Id.* at 8. Plaintiff wrote that he had filed many more grievances since July 9, 2014, and he attached copies of his September 10 and September 19, 2014, grievances regarding the September 10, 2014, alleged assault. *Id.* at 8.

In his letter, Plaintiff asked Gregory to file the two grievances so that he could exhaust his administrative remedies on the assault claim. *Id.* Plaintiff also requested that a September 9, 2014, grievance regarding his religious beliefs which he had previously submitted to the IGP office be filed. Gregory responded by memorandum of November 24, 2014, acknowledging receipt of the three grievances sent by Plaintiff and informing Plaintiff that “[i]n accordance with Directive # 4040 Section 701.5(a)(1): ***Filing a complaint . . . The complaint may only be filed at the facility where the inmate is housed even if it pertains to another facility.***” Therefore, your

complaints are being returned to you to submit to the IGP office at your present facility. Copies will not (sic) retained in this office.” (emphasis in original). *Id.* at 14.

Defendants have submitted evidence in support of their motion establishing that there are no IGP records showing that Plaintiff filed any grievance regarding the September 10, 2014, alleged assault by Defendants while he was at Clinton, Southport, or Five Points. (Dkt. Nos. 16-5 at ¶ 14; 16-7 at ¶ 14; 16-9 at ¶ 14; 23-1 at ¶ 7; 23-2 at 2.<sup>2</sup>) Defendants have also submitted evidence establishing that there was no record of an appeal to CORC of any grievance related to the assault. (Dkt. Nos. 16-11 at ¶ 15; 16-12 at 2-3.)

## **II. APPLICABLE SUMMARY JUDGMENT LEGAL STANDARD**

Summary judgment may be granted only if the submissions of the parties taken together “show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56; *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). The party moving for summary judgment bears the initial burden of showing, through the production of admissible evidence that no genuine issue of material fact exists. *Salahuddin v. Goord*, 467 F.3d 263, 272-73 (2d Cir. 2006). A dispute of fact is “genuine” if “the [record] evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248.

Only after the moving party has met this burden is the nonmoving party required to produce evidence demonstrating that genuine issues of material fact exist. *Salahuddin*, 467 F.3d at 272-73. The nonmoving party must do more than “rest upon the mere allegations . . . of the [plaintiff]’s pleading” or “simply show that there is some metaphysical doubt as to the material

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<sup>2</sup> Paragraph numbers are used where documents identified by the CM/ECF docket number contain consecutively numbered paragraphs.

facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986).

“Conclusory allegations, conjecture and speculation . . . are insufficient to create a genuine issue of fact.” *Kerzer v. Kingly Mfg.*, 156 F.3d 396, 400 (2d Cir. 1998).

A party opposing summary judgment is required to submit admissible evidence. *See Spiegel v. Schulmann*, 604 F.3d 72, 81 (2d Cir. 2010) (“It is well established that in determining the appropriateness of a grant of summary judgment, [the court] . . . may rely only on admissible evidence.”) (citation and internal quotation marks omitted). A plaintiff’s verified complaint is to be treated as an affidavit. *Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir. 1995) (“A verified complaint is to be treated as an affidavit . . . and therefore will be considered in determining whether material issues of fact exist . . . .”)<sup>3</sup> (citations omitted).

In *Jeffreys v. City of New York*, 426 F.3d 549, 554 (2d Cir. 2005), the Second Circuit reminded that on summary judgment motions “[t]he mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury could *reasonably* find for the plaintiff.” “To defeat summary judgment . . . nonmoving parties ‘may not rely on conclusory allegations or unsubstantiated speculation.’” *Jeffreys*, 426 F.3d at 554 (citation and internal quotation marks omitted). “At the summary judgment stage, a nonmoving party must offer some hard evidence showing that its version of the events is not wholly fanciful.” *Id.* (citation and internal quotation marks omitted). “[T]o satisfy Rule 56(e), affidavits must be based upon ‘concrete particulars,’ not conclusory allegations.” *Schwapp v. Town of Avon*, 118 F.3d 106, 111 (2d Cir. 1997) (citation omitted). “Statements that are devoid

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<sup>3</sup> The Court finds that Plaintiff’s complaint in this case was adequately verified under 28 U.S.C. § 1746 by use of the language “I declare under penalty of perjury that the foregoing is true and correct.” (Dkt. No. 1 at 7.)

of any specifics, but replete with conclusions, are insufficient to defeat a properly supported motion for summary judgment.” *Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 452 (2d Cir. 1999).

In determining whether a genuine issue of material fact exists, the court must resolve all ambiguities and draw all reasonable inferences against the moving party. *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 309 (2d Cir. 2008). Where a party is proceeding pro se, the court is obliged to “read [the pro se party’s] supporting papers liberally, and . . . interpret them to raise the strongest arguments that they suggest.” *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994). However, “a pro se party’s ‘bald assertion,’ unsupported by evidence, is not sufficient to overcome a motion for summary judgment.” *Cole v. Artuz*, No. 93 Civ. 5981 (WHP/JCF), 1999 WL 983876 at \*3 (S.D.N.Y. Oct. 28, 1999)<sup>4</sup> (citing *Carey v. Crescenzi*, 923 F.2d 18, 21 (2d Cir. 1991)).

### **III. EXHAUSTION OF ADMINISTRATIVE REMEDIES**

#### **A. Legal Standard for Exhaustion Under the PLRA**

Under the PLRA, “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a); *see also Ross v. Blake*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 1850, 1854-55 (2016). “There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court.” *Jones v. Bock*, 549 U.S. 199, 211 (2007). “[T]he PLRA’s exhaustion requirement applies to all inmate suits about prison life, whether they involve general

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<sup>4</sup> The Court will provide Plaintiff with copies of all unpublished decisions cited herein in accordance with the Second Circuit’s decision in *Lebron v. Sanders*, 557 F.3d 76 (2d Cir. 2009) (per curiam).



circumstances or particular episodes, and whether they allege excessive force or some other wrong.” *Porter v. Nussle*, 534 U.S. 516, 532 (2002).

The PLRA requires “proper exhaustion,” which means using all steps required by the administrative review process applicable to the institution in which an inmate is confined and doing so properly. *Jones*, 549 U.S. at 218 (citing *Woodford v. Ngo*, 548 U.S. 81, 88 (2006)); *see also Amador v. Andrews*, 655 F.3d 89, 96 (2d Cir. 2011) (exhaustion necessitates “using all steps that the [government] agency holds out, and doing so properly”) (internal quotations omitted). In New York State prisons, DOCCS has a well-established three-step IGP. *See* N.Y. Comp. Codes R. & Regs. tit. 7 (“7 NYCRR”), § 701.5.

First, an inmate must file a complaint with the facility IGP clerk within twenty-one days of the alleged occurrence. *Id.* § 701.5(a)(1). A representative of the facility’s IGRC has sixteen calendar days from receipt of the grievance to informally resolve the issue. *Id.* § 701.5(b)(1). If there is no such informal resolution, the full IGRC conducts a hearing within sixteen calendar days of receipt of the grievance, *id.* § 701.5(b)(2), and issues a written decision within two working days of the conclusion of the hearing. *Id.* § 701.5(b)(3).

Second, a grievant may appeal the IGRC’s decision to the facility superintendent within seven calendar days of receipt of the IGRC’s written decision. *Id.* § 701.5(c)(1). If the grievance involves an institutional issue (as opposed to a DOCCS-wide policy issue), the superintendent must issue a written decision within twenty calendar days of receipt of the grievant’s appeal. *Id.* § 701.5(c)(3)(ii). Grievances regarding DOCCS-wide policy issues are forwarded directly to CORC for a decision under the process applicable to the third step. *Id.* § 701.5(c)(3)(I).

Third, a grievant may appeal to CORC within seven working days of receipt of the superintendent's written decision. *Id.* § 701.5(d)(1)(I). CORC is to render a written decision within thirty calendar days of receipt of the appeal. *Id.* § 701.5(d)(3)(ii).

Grievances claiming employee harassment, including claims of excessive force, "are of particular concern to the administration of [DOCCS] facilities," and subject to an expedited procedure whereby the grievance goes directly to the facility superintendent. *Id.* § 701.8; *see, e.g., Torres v. Carry*, 691 F. Supp. 2d 366 (S.D.N.Y.) (Section 701.8 has been found applicable to claims of excessive force). The superintendent is required to initiate an in-house investigation by higher ranking supervisory personnel; request an investigation by the inspector general's office; or request an investigation by the New York State Police Bureau of Investigation if the superintendent determines that criminal activity may be involved. *Id.* at 701.8(d).

A grievance referred to the superintendent and determined to be an allegation of harassment, may not be withdrawn and must be addressed by the superintendent. *Id.* at 701.8(d). The superintendent is required to render a decision on the grievance within twenty-five calendar days, and extensions may be granted only with the consent of the grievant. *Id.* at 701.8(f). If the superintendent fails to respond within the required twenty-five days, the grievant may appeal the grievance to CORC by "filing a notice of decision to appeal (form #2133) with the inmate grievance clerk." *Id.* at 701.8(g).

Generally, if a prisoner has failed to properly follow each of the required steps of the above-described grievance procedure, including receiving a decision from CORC, prior to commencing litigation, he has failed to exhaust his administrative remedies and is barred from commencing a federal lawsuit. *Woodford*, 548 U.S. at 93; *Neal v. Goord*, 267 F.3d 116, 122-23 (2d Cir. 2001) (inmate commencing litigation before receiving a decision from CORC does not

satisfy PLRA's requirement that administrative remedies be exhausted before filing suit), *overruled on the other grounds*, *Nussle*, 534 U.S. 516; *Martin, II v. Niagara County Jail*, No. 05-CV-868 (JTC), 2012 WL 3230435, at \* 6 (W.D.N.Y. Aug. 6, 2012) (inmate who fails to exhaust his administrative remedies is barred from commencing a federal lawsuit).

Because failure to exhaust is an affirmative defense, defendants bear the burden of showing by a preponderance of the evidence that a plaintiff has failed to exhaust his available administrative remedies. *See Murray v. Palmer*, No. 9:03-CV-1010 (GTS/GHL), 2010 WL 1235591, at \*4 (N.D.N.Y. Mar. 31, 2010); *Bailey v. Fortier*, No. 09-CV-0742 (GLS/DEP), 2012 WL 6935254, at \*6 (N.D.N.Y. Oct. 4, 2012) (the party asserting failure to exhaust bears the burden of proving its elements by a preponderance of the evidence).

#### **B. Plaintiff's Failure to Exhaust**

Plaintiff has averred that he submitted the September 10 and 19, 2014, grievances regarding the assault to the officers making mail rounds while he was in SHU at Clinton. (Dkt. No. 20-2 at 4, 7.) The undisputed record evidence establishes that there is no record of those grievances having been filed at Clinton, Southport, or Five Points, or appealed to CORC. (Dkt. Nos. 16-5 at ¶ 14; 16-7 at ¶ 14; 16-9 at ¶ 14; 16-11 at ¶ 15; 16-12 at 2-323-1 at ¶ 7; 23-2 at 2.) Therefore, the Court finds that Plaintiff failed to exhaust his administrative remedies under the DOCCS IGP before commencing this lawsuit. *See Woodford*, 548 U.S. at 93; *Id.* §§ 701.8(f) and (g).

#### **C. Availability of the DOCCS IGP with Respect to Plaintiff's Alleged Assault by Defendants**

A prisoner's failure to exhaust does not end a court's exhaustion review. While the PLRA mandates exhaustion of administrative remedies, it also "contains its own, textual

exception to mandatory exhaustion.” *Ross*, 136 S. Ct. at 1858. More specifically, section 1997e(a) provides that only those administrative remedies that “are available” must first be exhausted. 42 U.S.C. § 1997e(a); *see also Ross*, 136 S. Ct. at 1858 (“[T]he exhaustion requirement hinges on the availability of administrative remedies[.]”) (quotations marks and citations omitted). In the PLRA context, the Supreme Court has determined that “availability” means that “an inmate is required to exhaust those, but only those, grievance procedures that are capable of use to obtain some relief for the action complained of.” *Ross*, 136 S. Ct. at 1859 (quotations and internal citations omitted).

To guide courts in the “availability” analysis, in *Ross*, the Supreme Court identified three circumstances in which a court may find that internal administrative remedies are not available to prisoners under the PLRA. *Id.* at 1859-60. First, “an administrative procedure is unavailable when (despite what regulations or guidance materials may promise) it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates.” *Id.* at 1859. “Next, an administrative scheme might be so opaque that it becomes, practically speaking, incapable of use.” *Id.* Finally, an administrative remedy is not “available” when “prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation.” *Id.* at 1860. When one of the three circumstances is found, “an inmate’s duty to exhaust ‘available’ remedies does not come into play.” *Id.* at 1859. Once a defendant has satisfied the burden of establishing a failure to exhaust, the plaintiff must establish that the IGP was unavailable to him. *See Jones*, 549 U.S. at 216.

The Court finds that the question of availability in this case is governed by the Second Circuit decision in *Williams v. Corr. Officer Priatno*, 829 F.3d 118 (2d Cir. 2016), in which the Court held that the opacity of 7 NYCRR § 708.1(g) rendered the DOCCS IGP procedure

unavailable to the plaintiff inmate and found that the plaintiff had exhausted his administrative remedies by giving his grievance to the corrections officer. As in this case, the inmate plaintiff in *Williams* claimed to have drafted a grievance complaining of an assault by corrections officers and given it to a corrections officer for delivery to the IGP office because he was in SHU. *Id.* at 120-21. The plaintiff in *Williams*, like Plaintiff herein, was transferred to another facility before hearing anything regarding the grievance he had given to corrections officers for filing. *Id.* As in this case, it was undisputed in *Williams* that the inmate plaintiff never received a response to the unfiled grievance and did not appeal the grievance to CORC under 7 NYCRR § 701.8(g). *Id.* at 125.

The Second Circuit acknowledged in *Williams* that under *Id.* § 701.8(g), the DOCCS regulation relevant in both *Williams* and this case, an inmate may appeal a grievance “to the next step” if he does not receive a timely response from the Superintendent. *Williams*, 829 F.3d at 124. The Court concluded, however, that:

Even if *Williams* technically could have appealed his grievance, we conclude that the regulatory scheme providing for that appeal is “so opaque” and “so confusing that . . . no reasonable prisoner can use [it].” *Ross*, 136 S.Ct. at 1859 (quoting Tr. of Oral Arg. 23). The regulations simply do not contemplate the situation in which *Williams* found himself, making it practically impossible for him to ascertain whether and how he could pursue his grievance.

*Id.* Accepting *Williams*’ allegation that the officer to whom he had given the grievance did not file it, the Court found:

Under that circumstance, the regulations do not adequately outline the process to appeal or otherwise exhaust administrative remedies. On their face, the regulations only contemplate appeals of grievances that were actually filed. For example, if the grievance had never been filed, the superintendent would never have received it and the timeline for her to provide a response within 25 days of “receipt of the grievance” would never have been triggered. NYCRR tit. 7, § 701.8(f). In turn, the textual provision allowing a

grievant to appeal to the CORC would never have come into effect. *See. Id.* 701.8(g) (“If the Superintendent fails to respond within the required 25 day calendar day time limit the grievant may appeal his/her grievance to CORC.”) Accordingly, the regulations give no guidance whatsoever to an inmate whose grievance was never filed.

*Id.* The Court noted in *Williams* that the obscurity of the regulation was compounded by Williams transfer to another facility approximately two weeks after having given the grievance to the corrections officer. *Id.* at 126.

Plaintiff in this case, as in *Williams*, does not rest his claim that he gave two grievances to Clinton corrections officers for filing on a mere conclusory assertion to that effect. *See Hicks v. Adams*, 692 F. App’x 647 (2d Cir. 2017) (contrasting *Williams* in which plaintiff had followed up with the superintendent on the grievance he had given to a corrections officer for filing, with the conclusory assertion by plaintiff in *Hicks* that his appeals were not transmitted by the prison staff without alleging any facts regarding when the appeals were submitted, to whom, and what, if any, steps he took to follow up on the grievance). Plaintiff herein followed up on his September 10, 2014, grievance with an October 24, 2014, letter to Gregory at Clinton and a subsequent letter to her on November 11, 2014, enclosing the two grievances relating to the assault for filing after being informed by her that no grievances had been filed. (Dkt. No. 20-2 at 11, 15.)

In response to Plaintiff’s opposition, Defendants submitted Gregory’s November 24, 2014, memorandum returning the three grievances Plaintiff had sent to her for filing on November 11, 2014, including his September 10 and 19, 2014, grievances regarding the assault, and advising him they had to be filed in the facility in which he was then being housed. (Dkt. No. 23-2 at 14.) In her reply declaration, Gregory states that Plaintiff nonetheless never properly submitted any grievance with regard to the assaults. The Court finds that the direction given to

Plaintiff to file the grievances at Five Points where he was then held does not render *Williams* inapplicable in this case. Gregory's memorandum regarding the proper place for filing grievances regarding matters that had occurred at another facility does nothing to clarify § 708.1(g) with respect to appealing to CORC from Plaintiff's unfiled and undecided grievances of September 10 and 19, 2014, that he claims were given to corrections officers for filing while he was still at Clinton.

Furthermore, under the DOCCS IGP, Plaintiff was required to file his grievance within twenty-one days of the occurrence of the incident being grieved. *See id.* § 701.5(a)(1). The alleged assault on Plaintiff by Defendants occurred on September 10, 2014, rendering his September 10 and 19, 2014, grievances timely. By the time the Plaintiff learned from Gregory's October 30, 2014, memorandum that no grievances had been filed regarding the assault, not only had the twenty-one day deadline expired, but the forty-five day limit on requesting an extension of time to file a grievance based upon mitigating circumstances had expired as well. *See id.* § 701.6(g)(1)(i)(a). There is nothing in the summary judgment record suggesting that had Plaintiff filed the grievances at Five Points after October 30, 2014, they would not have been rejected as untimely under the regulations.

Based upon the foregoing, the Court recommends that motion for summary judgment of Defendants Stotler, Collins, and Doe on the grounds that Plaintiff failed to exhaust his administrative remedies be denied. (Dkt. No. 16).

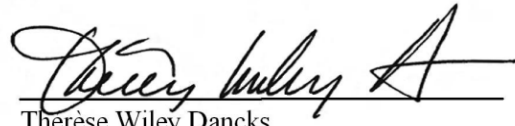
**WHEREFORE**, it is hereby

**RECOMMENDED** that Defendant's motion for summary judgment on exhaustion grounds (Dkt. No.16) be **DENIED**; and it is hereby

**ORDERED** that the Clerk provide Plaintiff with a copy of this Order and Report-Recommendation, along with copies of the unpublished decisions cited herein in accordance with *Lebron v. Sanders*, 557 F.3d 76 (2d Cir. 2009) (per curiam).

Pursuant to 28 U.S.C. § 636(b)(1), the parties have fourteen days within which to file written objections to the foregoing report.<sup>5</sup> Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN DAYS WILL PRECLUDE APPELLATE REVIEW.** *Roldan v. Racette*, 984 F.2d 85 (2d Cir. 1993) (citing *Small v. Sec’y of Health and Human Servs.*, 892 F.2d 15 (2d Cir. 1989) (per curiam)); 28 U.S.C. § 636(b)(1) (Supp. 2013); Fed. R. Civ. P. 72, 6(a).

Dated: April 27, 2018  
Syracuse, New York



Therese Wiley Dancks  
United States Magistrate Judge

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<sup>5</sup> If you are proceeding *pro se* and are served with this Order and Report-Recommendation by mail, three additional days will be added to the fourteen-day period, meaning that you have seventeen days from the date the Order and Report-Recommendation was mailed to you to serve and file objections. Fed. R. Civ. P. 6(d). If the last day of that prescribed period falls on a Saturday, Sunday, or legal holiday, then the deadline is extended until the end of the next day that is not a Saturday, Sunday, or legal holiday. Fed. R. Civ. P. 6(a)(1)(C).



2012 WL 6935254

Only the Westlaw citation is currently available.

United States District Court,  
N.D. New York.

Everton BAILEY, Plaintiff,

v.

M. FORTIER, Defendant.

Civ. Action No. 9:09-CV-0742 (GLS/DEP).

|  
Oct. 4, 2012.

#### Attorneys and Law Firms

Hancock Estabrook LLP, [Michael J. Sciotti, Esq.](#), [Robert Thorpe, Esq.](#), of Counsel, Syracuse, NY, for Plaintiff.

Hon. [Richard S. Hartunian](#), United States Attorney, [Charles E. Roberts, Esq.](#), Assistant U.S. Attorney, of counsel, Syracuse, NY, for Defendant.

#### REPORT AND RECOMMENDATION

[DAVID E. PEEBLES](#), United States Magistrate Judge.

\*1 Plaintiff Everton Bailey, a federal prison inmate, has commenced this [Bivens](#)<sup>1</sup> action against defendant Michelle Fortier, a corrections officer stationed at the prison facility in which Bailey was confined at the relevant times, alleging deprivation of his civil rights. Bailey's claims are based upon Fortier's alleged failure to protect him from an assault by a cellmate, despite having registered prior complaints expressing fear for his safety.

Currently at the forefront of the action is the threshold question of whether Bailey, who admits that he did not file a grievance following the procedures in place at Bureau of Prisons ("BOP") facilities, should be excused from the requirement of exhausting administrative remedies before commencing suit due to the alleged refusal of prison officials to provide him with the forms necessary to file a grievance. Because I find, based upon an evidentiary hearing conducted, that Bailey was not prevented by the actions of prison officials from filing a grievance regarding his claim against Fortier, and that he has offered no special circumstances providing a basis to excuse his failure to exhaust administrative remedies, I recommend that his

complaint be dismissed on this procedural basis, without addressing its merits.

#### I. BACKGROUND

Bailey is a federal prison inmate currently being held in the custody of the BOP as a result of a 2007 criminal conviction entered in the United States District Court for the Eastern District of Pennsylvania. *See generally* Complaint (Dkt. No. 1); *see also* VanWeelden Decl. (Dkt. No. 10-4) ¶ 5; June 20, 2012 Hearing Transcript (Dkt. No. 44) at p. 84.<sup>2</sup> While he is presently housed in another BOP facility, at times relevant to this litigation Bailey was designated by the BOP to the Ray Brook Federal Correctional Institution ("FCI Ray Brook"), located in Ray Brook, New York. *Id.*

On the morning of February 23, 2009, while housed in a six-person cell in the Mohawk Housing Unit at FCI Ray Brook, Bailey was confronted and physically assaulted by one of his cellmates after being accused of stealing that inmate's prayer oil. Complaint (Dkt. No. 1) ¶¶ 8-9; *see also* VanWeelden Decl. (Dkt. No. 10-4) Exh. D. Bailey reported the incident to Fortier, and requested that he be moved to another cell. Complaint (Dkt. No. 1) ¶ 10. That request was denied, and Bailey was directed by Fortier to return to his cell in light of an impending inmate count. *Id.* at ¶ 11.

Following the inmate count, Bailey again was accosted by the same inmate, who on this occasion threw hot oil from a ceramic mug onto his face.<sup>3</sup> Complaint (Dkt. No. 1) ¶ 13; VanWeelden Decl. (Dkt. No. 10-4) Exh. D; Tr. 100, 145. Bailey suffered [second degree burns](#) to his face resulting in his being hospitalized at an outside medical facility for a period of fourteen days. Complaint (Dkt. No. 1) ¶¶ 13-14; Tr. 32, 84-85. Upon his return to FCI Ray Brook, Bailey was placed in a special housing unit ("SHU") cell, where he remained until he was transferred to another BOP facility. Tr. 59-60, 85.

\*2 The BOP has established an Administrative Remedy Program ("ARP"), comprised of a four-step administrative process through which inmates can seek formal internal review of any complaint regarding any aspect of their imprisonment. Tr. 10; [28 C.F.R. § 542.10 et seq.](#); *see also Macias v. Zenk*, 495 F.3d 37, 42 (2d Cir.2007). In accordance with the established ARP protocol, an inmate must first attempt informal resolution

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of his or her complaint by presenting the issue informally to staff, and staff must attempt to resolve the issue. 28 C.F.R. § 542.13(a); see also *Johnson v. Testman*, 380 F.3d 691, 693 (2d Cir.2004). This informal, initial procedure typically begins with the filing of a “cop-out,” which can be submitted either on a BP-8 form available to inmates through several sources, including their assigned counselors, or on paper of any other description. Tr. 10, 22, 27, 66–67, 129, 142.

If the complaint cannot be resolved informally, the inmate may next submit a formal written Administrative Remedy Request (“ARR”) to the warden of the facility, utilizing a BP-9 form, within twenty calendar days of the event that generated the inmate's complaint.<sup>4</sup> Tr. 22, 32, 44; 28 C.F.R. § 542.14(a); see also *Johnson*, 380 F.3d at 693. That twenty-day period, however, can be extended in appropriate circumstances.<sup>5</sup> Tr. 33, 54, 144. If that formal request is denied, the inmate may next appeal the matter to the appropriate BOP Regional Director, utilizing a BP-10 form, within twenty calendar days of the date the grievance is denied by the facility warden. Tr. 22; 28 C.F.R. § 542.15(a); see also *Johnson*, 380 F.3d at 693. An unfavorable decision from the Regional Director can then be appealed to the General Counsel's office, utilizing a BP-11 form, within twenty calendar days of the date of the Regional Director's response. Tr. 22; 28 C.F.R. § 542.15(a).

Despite the existence of the ARP, Bailey did not avail himself of that process by filing a grievance regarding the assault or the defendant's alleged failure to protect him from it. Tr. 101–02, 106. Bailey claims that he requested the appropriate forms for commencing the grievance process from several prison workers, including Hawley Snyder, Barbara Darrah, and the warden at FCI Ray Brook. Tr. 86–88, 91, 93–95, 107–09. Employees at FCI Ray Brook, however, uniformly testified that Bailey never requested the appropriate grievance forms from them. See Tr. 72, 131, 146–47, 153, 155, 168; see also Tr. 49 (Robin Van Weelden); 161 (Jean Marie Diehl); 166 (Michelle Gonyea). I credit the testimony of defendant's witnesses and find that Bailey failed to ask his corrections counselor, or any other BOP employee at FCI Ray Brook, for the necessary forms to commence the grievance process.

The record also reflects that Bailey had abundant opportunity to secure the necessary grievance forms. In February and March of 2009, he was assigned a unit

team that included Barbara Darrah, his unit manager; Michelle Gonyea, a case worker; Hawley Snyder, his assigned corrections counselor; and one other corrections counselor.<sup>6</sup> Tr. 46, 86, 140–41. Members of Bailey's unit team, particularly his corrections counselor, were in frequent contact with him. See, e.g., Tr. 126, 129–30, 140–41, 165.

\*3 Various other BOP officials were also in regular contact with Bailey, making periodic rounds of the FCI Ray Brook SHU. Tr. 35. For example, at the times relevant to this litigation, the facility's warden typically visited the SHU every Wednesday morning, normally accompanied by Robin Van Weelden, who in February 2009 served as a legal assistant, as well as one or two associate wardens, a corrections captain, and unit team members. Tr. 35, 55. When making those rounds the group would proceed from cell to cell, knocking on doors and asking whether an inmate in a particular cell wished to voice any needs. Tr. 57. In addition, Barbara Darrah, as a unit manager, was required to visit inmates in the SHU twice weekly, although she testified that she was in that portion of the facility “pretty much daily.” Tr. 126. When visiting the SHU, Darrah generally carried with her a folder of various forms, including BP-8, BP-9, BP-10, BP-11 and cop-out forms, earning her the nickname “the form lady.” Tr. 70–71, 120, 124–27, 131. Like the warden and the warden's group, when visiting the SHU facility Darrah normally would proceed from cell-to-cell. Tr. 128. Similarly Michelle Gonyea, as plaintiff's case manager during February and March of 2009, was required to visit the SHU at least once weekly. Tr. 165.

Despite all of those visits and requests as to whether he needed anything, Bailey did not ask any of those individuals for the forms necessary to grieve Fortier's alleged failure to protect him from harm. Tr. 161–62, 166, 49–50, 72, 132, 144, 154–55, 161, 166.

As previously indicated, plaintiff was absent from FCI Ray Brook receiving outside treatment for his injuries during the fourteen-day period immediately following the inmate assault. In accordance with FCI Ray Brook policy requiring visits by prison officials to any inmate hospitalized for more than five days, Darrah, as plaintiff's unit manager, visited him in or about March of 2009, while he was a patient at the Adirondack Medical Center in Saranac Lake, in order to insure that his needs were being

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met. Tr. 133. When asked on that occasion whether he needed anything, Bailey replied, “No.”<sup>7</sup> *Id.*

## II. PROCEDURAL HISTORY

Bailey commenced this action on June 29, 2009. Dkt. No. 1. His complaint identifies Corrections Officer M. Fortier as the sole named defendant, and alleges that she violated his constitutional rights by failing to protect him from foreseeable harm. *Id.*

On January 8, 2010, prior to answering, Fortier moved to dismiss Bailey's complaint for failure to state a claim upon which relief may be granted, pursuant to [Rule 12\(b\)\(6\) of the Federal Rules of Civil Procedure](#) or, alternatively, for summary judgment pursuant to Rule 56. Dkt. No. 10. The sole basis for Fortier's motion was her contention that Bailey's complaint is subject to dismissal based upon his failure to exhaust available administrative remedies before commencing suit, as required under [42 U.S.C. § 1997e\(a\)](#). That motion resulted in my issuance of a report on August 30, 2010, recommending that the motion be denied, based upon the existence of genuine disputes of material fact to be resolved before addressing whether a proper basis for excusing the governing exhaustion requirement had been demonstrated. Dkt. No. 19. That recommendation was adopted by Chief District Judge Gary L. Sharpe on October 12, 2010. Dkt. No. 21.

\*4 Following the issuance and acceptance of my report and recommendation, the parties were afforded the opportunity to engage in discovery, and a scheduling order was entered requiring, *inter alia*, that any additional dispositive motions be filed on or before October 3, 2011. See Dkt. No. 23. All deadlines under that scheduling order have passed, without the filing of any additional motions, and the case is now trial-ready. In light of the existence of a threshold procedural issue regarding exhaustion, the matter was referred to me for the purpose of conducting an evidentiary hearing, pursuant to [Messa v. Goord](#), [652 F.3d 305 \(2d Cir.2011\)](#), in order to develop the record concerning Bailey's efforts to satisfy his exhaustion requirement. See Text Entry 11/02/11. That hearing was conducted on June 20, 2012, see Text Entry 6/20/12, and, following the close of the hearing, decision was reserved pending briefing by the parties.<sup>8, 9</sup>

## III. DISCUSSION

### A. Governing Legal Principles

The Prison Litigation Reform Act of 1996 (“PLRA”), [Pub.L. No. 104–134, 110 Stat. 1321 \(1996\)](#), which imposes several restrictions on the ability of prisoners to maintain federal civil rights actions, expressly requires that “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” [42 U.S.C. § 1997e\(a\)](#); see [Woodford v. Ngo](#), [548 U.S. 81, 84, 126 S.Ct. 2378, 2382, 165 L.Ed.2d 368 \(2006\)](#); [Hargrove v. Riley](#), No. CV–04–4587, 2007 WL 389003, at \*5–6 (E.D.N.Y. Jan.31, 2007). “[T]he PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.” [Porter v. Nussle](#), [534 U.S. 516, 532, 122 S.Ct. 983, 992, 152 L.Ed.2d 12 \(2002\)](#). An inmate plaintiff's complaint is subject to dismissal if the evidence establishes that he or she failed to properly exhaust available remedies prior to commencing the action, his or her complaint is subject to dismissal. See [Pettus v. McCoy](#), No. 04–CV–0471, 2006 WL 2639369, at \*1 (N.D.N.Y. Sept. 13, 2006) (McAvoy, J.); see also [Woodford](#), [548 U.S. at 94–95, 126 S.Ct. at 2387–88](#) (holding that the PLRA requires “proper exhaustion” of available remedies). “Proper exhaustion” requires a plaintiff to procedurally exhaust his or her claims by “compl[ying] with the system's critical procedural rules.” [Woodford](#), [548 U.S. at 95, 126 S.Ct. at 2388](#); see also [Macias](#), [495 F.3d at 43](#) (citing [Woodford](#) ). Complete exhaustion has not occurred, for purposes of the PLRA, until all of the steps of that available process have been taken. [Macias](#), [495 F.3d at 44](#); see also [Johnson v. Rowley](#), [569 F.3d 40, 45 \(2d Cir.2009\)](#); [Strong v. Lapin](#), No. 90–CV–3522, 2010 WL 276206, at \*4 (E.D.N.Y. Jan.15, 2010) (“Until the BOP's Central Office considers the appeal, no administrative remedy is considered to be fully exhausted.”).

\*5 In a series of decisions rendered since the enactment of the PLRA, the Second Circuit has crafted a three-part test for determining whether dismissal of an inmate plaintiff's complaint is warranted in the event of a failure to satisfy the PLRA's exhaustion requirement. [Macias](#), [495 F.3d at 41](#); see [Hemphill v. New York](#), [380 F.3d 680, 686 \(2d Cir.2004\)](#). Under the prescribed rubric, a court must first determine whether administrative remedies were available to the plaintiff at the relevant times. [Macias](#),

495 F.3d at 41; *Hemphill*, 380 F.3d at 686. If such a remedy existed and was available, the court must next examine whether the defendant should be deemed to have forfeited the affirmative defense of non-exhaustion by failing to properly raise or preserve it, or whether, through the defendant's own actions preventing the plaintiff from exhausting otherwise available remedies, he or she should be estopped from asserting failure to exhaust as a defense. *Id.* In the event the proffered defense survives these first two levels of scrutiny, the court must determine whether the plaintiff has established the existence of special circumstances sufficient “to justify the failure to comply with applicable administrative procedural requirements.”<sup>10</sup>, <sup>11</sup> *Id.*

### B. Burden of Proof

Before applying the foregoing legal principles, I must first consider who bears the burden of proof, and whether that burden shifts throughout the analysis prescribed under *Hemphill*.

As an affirmative defense, *Jones v. Bock*, 549 U.S. 199, 216, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007), exhaustion is a claim upon which the party asserting it typically bears the ultimate burden of proving its essential elements by a preponderance of the evidence. *Soria v. Girdich*, No. 9:04–CV–727, 2007 WL 4790807, at \*2 (N.D.N.Y. Dec. 2007) (DiBianco, M.J.) (citing *McCoy v. Goord*, 255 F.Supp.2d 233, 247 (S.D.N.Y.2003)); *McEachin v. Selsky*, No. 9:04–CV–83(FJS/RFT), 2005 WL 2128851, at \*4 (N.D.N.Y. Aug.30, 2005) (Scullin, C.J.) (citing *Howard v. Goord*, No. 98–CV–7471, 1999 WL 1288679, \*3 (E.D.N.Y. Dec. 28, 1999)), *aff'd in part, vacated in part*, 225 F. App'x 36 (2d Cir.2007). The issue is somewhat complicated, however, by consideration of the three-part analysis mandated by *Hemphill* and related cases because that line of cases incorporates concepts—such as estoppel, for example—that typically require the party asserting them to bear the ultimate burden of proof. *See e.g., Abbas v. Dixon*, 480 F.3d 636, 642 (2d Cir.2007) (“The plaintiff bears the burden of showing that the action was brought within a reasonable period of time after the facts giving rise to the equitable tolling or equitable estoppel ....”); *In re Heflin*, 464 B.R. 545, 554 (D.Conn.2011) (“The burden of providing every element of an estoppel is upon the party seeking to set up the estoppel.”) (citing *Comm'r v. Union Pac. R.R. Co.*, 86 F.2d 637, 640 (2d Cir.1936)).

\*6 Also complicating matters is the fact that several courts have held that once a defendant satisfies the burden of demonstrating that an inmate has failed to exhaust administrative remedies, it then becomes incumbent upon the plaintiff to counter with a showing of unavailability, estoppel, or special circumstances. *See, e.g., Murray v. Palmer*, No. 9:03–CV–1010 (GTS/GHL), 2010 WL 1235591, at \* 4 and n. 17 (N.D.N.Y. Mar.31, 2010) (Suddaby, J.); *see also Calloway v. Grimshaw*, No. 9:09–CV–1354, 2011 WL 4345299, at \*5 and n. 5 (N.D.N.Y. Aug.10, 2011) (Lowe, M.J.) (citing cases); *report and recommendation adopted*, 2011 WL 4345296 (N.D.N.Y. Sep.15, 2011) (McAvoy, S.J.); *Cohn v. KeySpan Corp.*, 713 F.Supp.2d 143, 155 (E.D.N.Y.2010) (finding that, in the employment discrimination context, defendants bear the burden of establishing the affirmative defense of failure to timely exhaust his administrative remedies, but once defendants have done so, the plaintiff must plead and prove facts supporting equitable avoidance of the defense.). Those decisions, while referencing the burden of proof on an affirmative defense, seem to primarily address an inmate's burden of *production*, or of going forward, to show facts that would form the basis for finding of unavailability, estoppel, or a finding of special circumstances, rather than speaking to the ultimate burden of *persuasion*.

I have been unable to uncover any cases squarely holding that the defendant bears the ultimate burden of proof with regard to all elements of a *Hemphill* analysis. In the final analysis, however, *Hemphill* addresses all of the elements a court is required to consider when analyzing an exhaustion defense. *See Macias*, 495 F.3d at 41 (“In *Hemphill* we “read together” [a series of cases] and formulated a three-part test ....”) (emphasis added). Therefore, I recommend a finding that, while the burden of production may shift to the plaintiff when a court undertakes a *Hemphill* analysis, the ultimate burden of proof with respect to the exhaustion defense remains, at all times, with the defendant. *See Soria*, 2007 WL 4790807, at \*2 (“[A]s with other affirmative defenses, the defendant has the burden of proof to show that plaintiff failed to exhaust his administrative remedies.”).

### C. Application of Governing Legal Principles

#### 1. Availability of Administrative Remedy

In this instance, the question of whether the ARP was available to Bailey is at the heart of the exhaustion



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analysis. The hearing testimony confirmed, and Bailey admitted, that at all times relevant to this litigation, there was an inmate grievance procedure in place at FCI Ray Brook. This, however, does not necessarily mean that it was “available” to the plaintiff.

Bailey contends that the grievance process was not available to him in light of the alleged refusal of prison officials to provide him with the forms necessary to file an ARR and pursue the grievance to culmination. Having considered the competing testimony, however, I conclude that Fortier has established, by a preponderance of the evidence, that the forms necessary to pursue a grievance in accordance with the ARP in place at FCI Ray Brook were available to Bailey through several sources, but were not requested. As such, Fortier has satisfied the first *Hemphill* factor.

## 2. Presentation of Defense/Estoppel

\*7 The focus of the second prong of the *Hemphill* analysis is upon “whether the defendants may have forfeited the affirmative defense of non-exhaustion by failing to raise or preserve it, or whether the defendants’ own actions inhibiting the inmate’s exhaustion of remedies may estop one or more of the defendants from raising the plaintiff’s failure to exhaust as a defense.” *Hemphill*, 380 F.3d at 686 (citations omitted). In her answer, Fortier raised exhaustion as a defense in a timely fashion. See Answer (Dkt. No. 22) Second Defense (“Plaintiff clearly failed to exhaust his administrative remedies, as required by the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a).”). Bailey argues, however, that his failure to follow the prescribed grievance process was a direct result of the refusal of prison officials to cooperate in his efforts to grieve the matter.

“ ‘Generally, a defendant in an action may not be estopped from asserting the affirmative defense of failure to exhaust administrative remedies based on the actions (or inactions) of other individuals.’ ” *Atkins v. Menard*, No. 9:11-CV-9366, 2012 WL 4026840, at \*3 (N.D.N.Y. Sept.12, 2012) (Suddaby, J.) (citing *Murray*, 2010 WL 1235591, at \*5 and n. 26 (collecting cases)). Put differently, a plaintiff must allege that a defendant named in the lawsuit acted to interfere with his ability to exhaust in order to establish a basis to estop that defendant from invoking the exhaustion defense. *Calloway*, 2011 WL 4345299, at \*4 (citing *Bennett v. James*, 737 F.Supp.2d

219, 226 (S.D.N.Y.2010), *aff’d*, 441 F. App’x 816 (2d Cir.2011)) (other citations omitted).

The question of whether, in this instance, prison officials should be estopped from asserting failure to exhaust as an affirmative defense as a result of their conduct is inextricably intertwined with the question of availability of the remedy. Assuming, however, that this presents a distinct inquiry, the court must examine whether, through her conduct, Fortier has provided a basis to estop her from asserting an exhaustion defense.

In this instance, Bailey does not allege that Fortier engaged in a campaign to preclude him from filing a grievance regarding her actions. Instead, his focus is upon the alleged refusal of other officials at FCI Ray Brook to provide him with necessary forms and cooperate in his efforts to present his grievance against Fortier. Accordingly, Bailey has failed to present any evidence that would support an estoppel against the defendant from raising the issue of exhaustion. *Atkins*, 2012 WL 4026840, at \*3. Therefore, I conclude that Fortier has proven, by a preponderance of the evidence, that she did not, through her own actions, preclude Bailey from taking advantage of the ARP and therefore should not be estopped from asserting the defense.

## 3. Special Circumstances

The third, catchall factor that must be considered under the Second Circuit’s prescribed exhaustion rubric centers upon whether special circumstances sufficient to justify excusing the plaintiff’s failure to exhaust administrative remedies have been demonstrated. *Hemphill*, 380 F.3d at 689; see also *Giano*, 380 F.3d at 676–77; *Hargrove*, 2007 WL 389003, at \*10. Among the circumstances potentially qualifying as “special” under this prong of the test is where a plaintiff’s reasonable interpretation of applicable regulations regarding the grievance process differs from that of prison officials and leads him or her to conclude that the dispute is not grievable. *Giano*, 380 F.3d at 676–77; see also *Hargrove*, 2007 WL 389003, at \*10 (quoting and citing *Giano* ). Special circumstances may also exist when a facility’s “[f]ailure to provide grievance deposit boxes, denial of forms and writing materials, and a refusal to accept or forward plaintiff’s appeals—which effectively rendered the grievance process unavailable to him.” *Murray*, 2010 WL 1235591, at \*6 (quoting *Sandlin v. Poole*, 488 (W.D.N.Y.2008) (noting that “[s]uch facts support a finding that defendant’s are estopped from

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relying on exhaustion defense as ‘special circumstances’ excusing plaintiff’s failure to exhaust”).

\*8 During the evidentiary hearing, Bailey testified to his awareness of the existence of the ARP at FCI Ray Brook. *See, e.g.*, Tr. 102. Bailey’s testimony regarding his alleged efforts to secure the forms necessary to pursue the grievance plainly evidences his knowledge of the requirement that he exhaust available administrative remedies, and negates a finding of any reasonable belief on his part that the dispute in issue was not grievable and could not have been presented through the BOP’s internal grievance process. Accordingly, again allocating the ultimate burden of proof on the issue of special circumstances to the defendant, I nonetheless conclude that she has demonstrated, by a preponderance of the evidence, the absence of any special circumstances that would serve to excuse plaintiff’s failure to exhaust administrative remedies.

#### IV. SUMMARY AND RECOMMENDATION

The credible testimony and evidence adduced at the recent hearing, held to address the merits of defendant’s exhaustion defense, establishes that (1) Bailey failed to avail himself of the BOP grievance process, which was available to him, before commencing this action; (2) Fortier did not, through her actions, preclude Bailey from

filing a grievance regarding the claims set forth in his complaint, or otherwise engage in conduct for which she should be estopped from asserting failure to exhaust as an affirmative defense; and (3) Bailey has offered no special circumstances warranting that he be excused from the PLRA’s exhaustion requirement. Accordingly, it is therefore hereby respectfully

RECOMMENDED, that plaintiff’s complaint in this action be DISMISSED, based upon his failure to comply with the exhaustion requirements of 42 U.S.C. § 1997e(a).

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1), the parties may lodge written objections to the foregoing report. Such objections must be filed with the Clerk of the Court within FOURTEEN days of service of this report. FAILURE TO SO OBJECT TO THIS REPORT WILL PRECLUDE APPELLATE REVIEW. 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 6(a), 6(d), 72; *Roldan v. Racette*, 984 F.2d 85 (2d Cir.1993).

It is hereby ORDERED that the clerk of the court serve a copy of this report and recommendation upon the parties in accordance with this court’s local rules.

#### All Citations

Not Reported in F.Supp.2d, 2012 WL 6935254

#### Footnotes

- 1 *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).
- 2 The June 20, 2012 Hearing Transcript (Dkt. No. 44) will hereinafter be cited as “Tr. \_\_\_\_”.
- 3 According to Bailey, there were no corrections officers present in his cell unit at the time of the assault. Complaint (Dkt. No. 1) ¶ 13.
- 4 Plaintiff was aware of the twenty-day limitation for filing a BP–9 form to initiate the formal grievance process. Tr. 103.
- 5 Here, the record demonstrates that in light of his circumstances, including the fourteen-day period of hospitalization following the incident, Bailey almost certainly would have been granted relief from that requirement had such a request been made. *See* Tr. 43, 144. I note, parenthetically, that the handbook provided to inmates at FCI Ray Brook does not address the possibility of requesting an extension of the twenty-day time limit for filing a BP–9. *See* Tr. 34, 43.
- 6 Jean Marie Diehl took over as plaintiff’s correction counselor in or about September 2009, shortly before Snyder’s retirement from the BOP. Tr. 140, 163.
- 7 During the hearing Bailey testified that he did not recall Darrah visiting him. *See* Tr. 114. Once again, I credit the testimony of Darrah over that of the Bailey with respect to this issue.
- 8 The hearing was conducted by video conference, with Bailey participating and testifying from the Kentucky federal correctional facility in which he is currently being held, pursuant to Rule 43(a) of the Federal Rules of Civil Procedure. *See Rivera v. Santirocco*, 814 F.2d 859, 862 (2d Cir.1987). At the outset of the hearing I placed upon the record the factors which I considered in declining to exercise my discretion to require that Bailey be produced in person for the evidentiary hearing. *See* Tr. 3.

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- 9 Attorney Michael J. Sciotti, Esq., of the firm of Hancock & Estabrook, LLP, was appointed in January 2012 to represent the plaintiff in this action, *pro bono*, at the hearing. The court wishes to express its thanks to Attorney Sciotti and his co-counsel, Robert Thorpe, Esq., for their energetic and diligent efforts on behalf of the plaintiff.
- 10 In *Macias*, which, like this action, involved an Eighth Amendment claim under *Bivens*, as well as claims under the Federal Court Claims Act, 28 U.S.C. § 2671 *et seq.*, defendants asserted that plaintiff's complaint was subject to dismissal under the PLRA based upon his failure to exhaust available administrative remedies. *Macias*, 495 F.3d at 40. Reiterating the importance of exhaustion in both a substantive and a procedural sense, the Second Circuit concluded that, while a prisoner may have substantively exhausted remedies by making informal complaints regarding the conditions at issue, the PLRA, as illuminated by *Woodford*, 548 U.S. 81, 126 S.Ct. 2378, 165 L.Ed.2d 368, requires proper procedural exhaustion through the available grievance channels. *Id.* at 41. The court left open, however, the possibility that, notwithstanding the Supreme Court's decision in *Woodford*, a defendant could be precluded from asserting failure to exhaust available administrative remedies in the event of a finding that threats by prison officials may have deterred compliance with the PLRA exhaustion requirements, including under *Hemphill*. *Id.* at 44–45. The court in *Macias* also noted that the plaintiff in that case did not assert that the available internal remedial scheme was so confusing as to excuse his failure to avail himself of that process, thereby obviating the need for the court to determine what effect, if any, *Woodford* would have upon the *Hemphill* holding to the effect that a reasonable misinterpretation of the available scheme could justify an inmate's failure to follow the procedural rules. See *Amador v. Superintendents of Dep't of Correctional Serv.*, No. 03 CIV. 0650 (KTD/CWG), 2007 WL 4326747, at \*6 (S.D.N.Y. Dec.4, 2007). It therefore appears that the teachings of *Hemphill* remain intact, at least with regard to the first two points of inquiry. *Id.* at \*7.
- 11 In practicality, these three prongs of the prescribed test, though perhaps intellectually distinct, plainly admit of significant overlap. See *Hargrove*, 2007 WL 389003, at \*8 n. 14; see also *Giano v. Goord*, 380 F.3d 670, 677 n. 6 (2d Cir.2004).

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United States District Court, S.D. New York.

Craig COLE, Plaintiff,

v.

Christopher P. ARTUZ, Superintendent, Green  
Haven Correctional Facility, R. Pflueger, A.  
Glemmon, Sgt. Stevens, Lt. Haubert, Capt.  
W.M. Watford, Capt. T. Healey, and John  
Doe # 1-5, all as individuals, Defendants.

No. 93 Civ. 5981(WHP) JCF.

|  
Oct. 28, 1999.**Attorneys and Law Firms**

Mr. Craig Cole, Bare Hill Correctional Facility, Malone,  
New York, Legal Mail, Plaintiff, pro se.

William Toran, Assistant Attorney General, Office of the  
Attorney General of the State of New York, New York,  
New York, for Defendant.

**MEMORANDUM & ORDER**

PAULEY, J.

\*1 The remaining defendant in this action, Correction Officer Richard Pflueger, having moved for an order, pursuant to [Fed.R.Civ.P. 56](#), granting him summary judgment and dismissing the amended complaint, and United States Magistrate Judge James C. Francis IV having issued a report and recommendation, dated August 20, 1999, recommending that the motion be granted, and upon review of that report and recommendation together with plaintiff's letter to this Court, dated August 28, 1999, stating that plaintiff does "not contest the dismissal of this action", it is

ORDERED that the attached report and recommendation of United States Magistrate Judge James C. Francis IV, dated August 20, 1999, is adopted in its entirety; and it is further

ORDERED that defendant Pflueger's motion for summary judgment is granted, and the amended complaint is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly and close this case.

**REPORT AND RECOMMENDATION**

FRANCIS, Magistrate J.

The plaintiff, Craig Cole, an inmate at the Green Haven Correctional Facility, brings this action pursuant to [42 U.S.C. § 1983](#). Mr. Cole alleges that the defendant Richard Pflueger, a corrections officer, violated his First Amendment rights by refusing to allow him to attend religious services. The defendant now moves for summary judgment pursuant to [Rule 56 of the Federal Rules of Civil Procedure](#). For the reasons set forth below, I recommend that the defendant's motion be granted.

**Background**

During the relevant time period, Mr. Cole was an inmate in the custody the New York State Department of Correctional Services ("DOCS"), incarcerated at the Green Haven Correctional Facility. (First Amended Complaint ("Am.Compl.") ¶ 3). From June 21, 1993 to July 15, 1993, the plaintiff was in keeplock because of an altercation with prison guards. (Am.Compl.¶¶ 17-25). An inmate in keeplock is confined to his cell for twenty-three hours a day with one hour for recreation. (Affidavit of Anthony Annucci dated Dec. 1, 1994 ¶ 5). Pursuant to DOCS policy, inmates in keeplock must apply for written permission to attend regularly scheduled religious services. (Reply Affidavit of George Schneider in Further Support of Defendants' Motion for Summary Judgment dated September 9, 1996 ("Schneider Aff.") ¶ 3). Permission is granted unless prison officials determine that the inmate's presence at the service would create a threat to the safety of employees or other inmates. (Schneider Aff. ¶ 3). The standard procedure at Green Haven is for the captain's office to review all requests by inmates in keeplock to attend religious services. (Schneider Aff. ¶ 3). Written approval is provided to the inmate if authorization is granted. (Affidavit of Richard Pflueger dated April 26, 1999 ("Pflueger Aff.") ¶ 5). The inmate must then present the appropriate form to the gate officer before being released to attend the services. (Pflueger Aff. ¶ 5).



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\*2 On June 28, 1993, the plaintiff submitted a request to attend the Muslim services on July 2, 1993. (Request to Attend Scheduled Religious Services by Keep-Locked Inmate dated June 28, 1993 (“Request to Attend Services”), attached as Exh. B to Schneider Aff.) On June 30, 1993, a supervisor identified as Captain Warford signed the request form, indicating that the plaintiff had received permission to attend the services. (Request to Attend Services). Shortly before 1:00 p.m. on July 2, 1993, the plaintiff requested that Officer Pflueger, who was on duty at the gate, release him so that he could proceed to the Muslim services. (Pflueger Aff. ¶ 3). However, Officer Pflueger refused because Mr. Cole had not presented the required permission form. (Pflueger Aff. ¶ 3). The plaintiff admits that it is likely that he did not receive written approval until some time thereafter. (Deposition of Craig Cole dated February 28, 1999 at 33–35, 38).

On August 25, 1993, the plaintiff filed suit alleging that prison officials had violated his procedural due process rights. On December 4, 1995, the defendants moved for summary judgment. (Notice of Defendants' Motion for Summary Judgment dated December 4, 1995). The Honorable Kimba M. Wood, U.S.D.J., granted the motion and dismissed the complaint on the grounds that the plaintiff failed to show that he had been deprived of a protected liberty interest, but she granted the plaintiff leave to amend. (Order dated April 5, 1997). On May 30, 1997, the plaintiff filed an amended complaint, alleging five claims against several officials at the Green Haven Correctional Facility. (Am.Compl.) On November 16, 1998, Judge Wood dismissed all but one of these claims because the plaintiff had failed to state a cause of action or because the statute of limitations had elapsed. (Order dated Nov. 16, 1998). The plaintiff's sole remaining claim is that Officer Pflueger violated his First Amendment rights by denying him access to religious services on July 2, 1993. The defendant now moves for summary judgment on this issue, arguing that the plaintiff has presented no evidence that his First Amendment rights were violated. In addition, Officer Pflueger contends that he is entitled to qualified immunity. (Defendants' Memorandum of Law in Support of Their Second Motion for Summary Judgment).

#### A. Standard for Summary Judgment

Pursuant to [Rule 56 of the Federal Rules of Civil Procedure](#), summary judgment is appropriate where “the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” [Fed.R.Civ.P. 56\(c\)](#); *see also Tomka v. Seiler Corp.*, 66 F.3d 1295, 1304 (2d Cir.1995); *Richardson v. Selsky*, 5 F.3d 616, 621 (2d Cir.1993). The moving party bears the initial burden of demonstrating “the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the movant meets that burden, the opposing party must come forward with specific evidence demonstrating the existence of a genuine dispute concerning material facts. [Fed.R.Civ.P. 56\(c\)](#); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). In assessing the record to determine whether there is a genuine issue of material fact, the court must resolve all ambiguities and draw all factual inferences in favor of the nonmoving party. *Anderson*, 477 U.S. at 255; *Vann v. City of New York*, 72 F.3d 1040, 1048–49 (2d Cir.1995). But the court must inquire whether “there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party” and grant summary judgment where the nonmovant's evidence is conclusory, speculative, or not significantly probative. *Anderson*, 477 U.S. at 249–50 (citation omitted). “The litigant opposing summary judgment may not rest upon mere conclusory allegations or denials, but must bring forward some affirmative indication that his version of relevant events is not fanciful.” *Podell v. Citicorp Diners Club, Inc.*, 112 F.3d 98, 101 (2d Cir.1997) (citation and internal quotation omitted); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (a non-moving party “must do more than simply show that there is some metaphysical doubt as to the material facts”); *Goenaga v. March of Dimes Birth Defects Foundation*, 51 F.3d 14, 18 (2d Cir.1995) (nonmovant “may not rely simply on conclusory statements or on contentions that the affidavits supporting the motion are not credible”) ((citations omitted)). In sum, if the court determines that “the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita Electric Industrial Co.*, 475 U.S. at 587 (quoting *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288 (1968)); *Montana v. First Federal Savings & Loan Association*, 869 F.2d 100, 103 (2d Cir.1989).

\*3 Where a litigant is *pro se*, his pleadings should be read liberally and interpreted “to raise the strongest arguments that they suggest.” *McPherson v. Coombe*, 174

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F.3d 276, 280 (2d Cir.1999) (quoting *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir.1994)). Nevertheless, proceeding *pro se* does not otherwise relieve a litigant from the usual requirements of summary judgment, and a *pro se* party's "bald assertion," unsupported by evidence, is not sufficient to overcome a motion for summary judgment. See *Carey v. Crescenzi*, 923 F.2d 18, 21 (2d Cir.1991); *Gittens v. Garlocks Sealing Technologies*, 19 F.Supp.2d 104, 110 (W.D.N.Y.1998); *Howard Johnson International, Inc. v. HBS Family, Inc.*, No. 96 Civ. 7687, 1998 WL 411334, at \*3 (S.D. N.Y. July 22, 1998); *Kadosh v. TRW, Inc.*, No. 91 Civ. 5080, 1994 WL 681763, at \*5 (S.D.N.Y. Dec. 5, 1994) ("the work product of *pro se* litigants should be generously and liberally construed, but [the *pro se*'] failure to allege either specific facts or particular laws that have been violated renders this attempt to oppose defendants' motion ineffectual"); *Stinson v. Sheriff's Department*, 499 F.Supp. 259, 262 (S.D.N.Y.1980) (holding that the liberal standard accorded to *pro se* pleadings "is not without limits, and all normal rules of pleading are not absolutely suspended").

#### B. Constitutional Claim

It is well established that prisoners have a constitutional right to participate in congregate religious services even when confined in keeplock. *Salahuddin v. Coughlin*, 993 F.2d 306, 308 (2d Cir.1993); *Young v. Coughlin*, 866 F.2d 567, 570 (2d Cir.1989). However, this right is not absolute. See *Benjamin v. Coughlin*, 905 F.2d 571, 574 (2d Cir.1990) (right to free exercise balanced against interests of prison officials). Prison officials can institute measures that limit the practice of religion under a "reasonableness" test that is less restrictive than that which is ordinarily applied to the alleged infringement of fundamental constitutional rights. *O'Lone v. Estate of Shaabazz*, 482 U.S. 342, 349 (1986). In *O'Lone*, the Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 349 (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)). The evaluation of what is an appropriate and reasonable penological objective is left to the discretion of the administrative officers operating the prison. *O'Lone*, 482 U.S. at 349. Prison administrators are "accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to

maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547 (1979).

The policy at issue here satisfies the requirement that a limitation on an inmate's access to religious services be reasonable. The practice at Green Haven was to require inmates in keeplock to present written approval to the prison gate officer before being released to attend religious services. This policy both accommodates an inmate's right to practice religion and allows prison administrators to prevent individuals posing an active threat to security from being released. The procedure is not overbroad since it does not permanently bar any inmate from attending religious services. Rather, each request is decided on a case-by-case basis by a high ranking prison official and denied only for good cause.

\*4 Furthermore, in order to state a claim under § 1983, the plaintiff must demonstrate that the defendant acted with deliberate or callous indifference toward the plaintiff's fundamental rights. See *Davidson v. Cannon* 474 U.S. 344, 347-48 (1986) (plaintiff must show abusive conduct by government officials rather than mere negligence). Here, there is no evidence that the defendant was reckless or even negligent in his conduct toward the plaintiff or that he intended to violate the plaintiff's rights. Officer Pflueger's responsibility as a prison gate officer was simply to follow a previously instituted policy. His authority was limited to granting access to religious services to those inmates with the required written permission. Since Mr. Cole acknowledges that he did not present the necessary paperwork to Officer Pflueger on July 2, 1993, the defendant did nothing improper in denying him access to the religious services. Although it is unfortunate that the written approval apparently did not reach the plaintiff until after the services were over, his constitutional rights were not violated.<sup>1</sup>

#### Conclusion

For the reasons set forth above, I recommend that the defendant's motion for summary judgment be granted and judgment be entered dismissing the complaint. Pursuant to 28 U.S.C. § 636(b)(1) and Rules 72, 6(a), and 6(e) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days to file written objections to this report and recommendation. Such objections shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of the Honorable William H. Pauley III,

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Room 234, 40 Foley Square, and to the Chambers of the undersigned, Room 1960, 500 Pearl Street, New York, New York 10007. Failure to file timely objections will preclude appellate review.

**All Citations**

Not Reported in F.Supp.2d, 1999 WL 983876

Respectfully submitted,

**Footnotes**

- 1** In light of this finding, there is no need to consider the defendant's qualified immunity argument.

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**End of Document**

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Only the Westlaw citation is currently available.  
United States District Court,  
W.D. New York.

Cornelius MARTIN, II, Plaintiff,  
v.  
The NIAGARA COUNTY JAIL, et al., Defendants.

No. 05-CV-868(JTC).

|  
Aug. 6, 2012.

#### Attorneys and Law Firms

Cornelius Martin, II, pro se.

Webster Szanyi, LLP (Charles E. Graney, Esq. and Mark C. Davis, Esq., of Counsel), Buffalo, NY, for Defendants Niagara County Jail, Beilein, Mahar, Drehs, and Woock.

Roach, Brown, McCarthy & Gruber, P.C. (Joel J. Java, Jr., Esq., of Counsel), Buffalo, NY, for Defendants Hohensee, Aikin, and Inter-Community Memorial Hospital.

JOHN T. CURTIN, District Judge.

#### INTRODUCTION

\*1 Plaintiff brought this action pursuant to 42 U.S.C. § 1983 seeking compensatory and punitive damages for the alleged deliberate indifference to his serious medical needs and the deprivation of medical care. Currently pending before the court are the defendants' motions for summary judgment (Items 59, 60) and plaintiff's cross-motion for summary judgment on liability (Item 62).

#### BACKGROUND

Plaintiff commenced this action on December 12, 2005 with the filing of a *pro se* complaint pursuant to Title 42 U.S.C. § 1983 (Item 1). He filed an amended complaint on March 30, 2006 (Item 6). Plaintiff seeks injunctive relief and compensatory and punitive damages for the alleged deliberate indifference to his medical needs in violation of his rights under the Eighth Amendment to the United States Constitution.

Answers to the amended complaint were filed on November 13, 2006, by defendants Mahar, Drehs, Woock, Niagara County Jail, and Beilein ("the County defendants") (Item 18), and on November 15, 2006 by defendants Hohensee, Aikin, and Inter-Community Memorial Hospital ("the medical defendants") (Item 22). Plaintiff's deposition was taken on September 4, 2008. Following the deposition, the parties stipulated to the following: 1) plaintiff agreed to withdraw his claims against the defendants based on excessive dust, regarding his treatment for sinus problems, and arising from his lack of a mattress and pillow for 12 hours; 2) plaintiff agreed to withdraw his claims against defendants Drehs and Woock individually; 3) all issues regarding plaintiff's CPAP machine were resolved; and 4) plaintiff acknowledged that his claim that he did not receive an inmate handbook did not constitute a violation of the Eighth Amendment (Item 53).

Pursuant to a case management order and following the parties' exchange of discovery materials, on August 27, 2009, the medical defendants moved for summary judgment pursuant to Fed.R.Civ.P. 56 (Item 59). On August 28, 2009, the County defendants filed a motion for summary judgment (Item 60). Defendants assert the following grounds for summary judgment: 1) the plaintiff failed to exhaust his administrative remedies in accordance with the Prison Litigation Reform Act of 1995; 2) Inter-Community Memorial Hospital cannot be held liable on the basis of *respondeat superior*; 3) there was no deliberate indifference to plaintiff's medical needs; 4) defendants are entitled to qualified immunity; and 5) plaintiff's claims against Sheriff Beilein must be dismissed as they are based on a policy that does not exist.

Plaintiff filed his cross-motion for summary judgment on August 31, 2009 (Item 62). He asserted that administrative remedies were unavailable to him as he never received an inmate handbook at the Niagara County Jail. Plaintiff also argued that he suffers from a serious medical need and that the interference by the defendants with his ongoing medical treatment constituted deliberate indifference.

\*2 On October 30, 2009, defendants filed responses in opposition to plaintiff's motion for summary judgment (Items 66, 67). Plaintiff filed a response to defendant's motions on November 5, 2009 and agreed to withdraw his claim against Inter-Community Memorial Hospital

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(Item 68, p. 3). Thereafter, on January 27, 2010, the medical defendants filed a reply (Item 70), and the County defendants filed a reply on January 29, 2010 (Item 71).

The court has determined that oral argument is unnecessary. For the reasons that follow, defendants' motions for summary judgment are granted, and plaintiff's motion for summary judgment is denied.

## FACTS<sup>1</sup>

Plaintiff was incarcerated at the Niagara County Jail ("NCJ") from May 11, 2005 through July 5, 2005, and again from October 7, 2005 until February 3, 2006. At the time he entered the jail, he had been undergoing treatment following multiple spinal surgeries which consisted of physical therapy; two 80 milligram time-released [oxycontin](#) pills, one taken at night and one in the morning; and five milligram [oxycodone](#) pills to be taken in combination with [aspirin](#) or [tylenol](#) for breakthrough pain (Item 59, Exh. H, "Martin Dep.," p. 20). Plaintiff stated that while he was not addicted to [oxycontin](#), he was physically "dependent" on the medication. *Id.*, p. 34.

At the time he was booked into the NCJ on May 11, 2005, plaintiff was evaluated by defendant Mahar, a nurse employed by the NCJ. She noted a diagnosis of [diabetes](#) and [sleep apnea](#) and a prior history of spinal surgery (Item 60, Att. 6, "Mahar Aff.," Exh. A). Nurse Mahar contacted defendant Aikin, the nurse practitioner for the NCJ, who issued a telephone order for plaintiff to be started on the facility's [diabetes](#) and detoxification protocols. *Id.*, ¶¶ 14–15. According to the signed standing medical orders of the detox protocol, Nurse Mahar gave plaintiff one tablet of darvocet on the evening of May 11, 2005. *Id.*, ¶ 16.

As a result of being on the detox protocol, plaintiff was housed in an area of the NCJ that he described as "squalor" (Martin Dep., pp. 51, 97). On May 13, 2005, plaintiff asked to be removed from the detox program so that he could be moved to more suitable housing for federal prisoners. *Id.*, p. 98. As a result of being denied [oxycontin](#), plaintiff testified that he suffered sweats, tremors, extremely [high blood pressure](#), diarrhea, and pain in his extremities which lasted about a week to ten days. *Id.*, p. 41, 42. Other than extremity pain, the withdrawal symptoms plaintiff experienced as a result of

the detox protocol have all resolved. *Id.*, p. 47. While housed at the NCJ, plaintiff was also prescribed [Ultram](#) for pain, nasal spray for [rhinitis](#), [Imodium](#) for diarrhea, and blood pressure medication for [hypertension](#). *Id.*, pp. 44, 54, 106–07.

Prior to his admission to the NJC, plaintiff had not spent a significant amount of time in custody in a New York State jail or prison. He spent 14 days at the Erie County Medical Center awaiting extradition to Ohio in 1995, and approximately one hour in Fredonia awaiting bail in 1990 (Martin Dep., pp. 61–62). He was not familiar with the grievance process and had never filed a grievance. *Id.*, pp. 62–63. Plaintiff stated that he learned of the grievance process in December 2005 or January 2006 by reading the New York State "Minimum Standards" binder in the facility law library. *Id.*, pp. 65, 86.

\*3 During the intake process, plaintiff signed a form acknowledging receipt of a inmate handbook, although he denies receiving the handbook either time he was processed. Plaintiff stated that he simply signed the acknowledgment because he was told to do so by the admitting officer (Martin Dep., pp. 80, 84–85). He filed a grievance related to his Eighth Amendment claim on January 2, 2006 and pursued the grievance through the appeals process. *Id.*, pp. 71–72.

In support of the motion for summary judgment, defendants submitted an affidavit of Captain Duane Vendetta, grievance coordinator for the Niagara County Sheriff's Department (Item 60, att. 7). The grievance policy in effect at the time plaintiff was incarcerated provided that inmates must complete and submit a grievance form within five days of the act or occurrence giving rise to the grievance. *Id.*, ¶ 9. If the inmate is dissatisfied with the decision of the grievance coordinator, he can appeal to the Chief Administrative Officer of the facility. *Id.*, ¶ 10. After receiving a response from the Chief Administrative Officer, the inmate could seek review of the decision with the Citizen's Policy and Complaint Review Council ("CPCRC") of the New York State Commission of Correction. *Id.*, ¶ 11. Capt. Vendetta stated he reviewed the grievance file for the time period that plaintiff was incarcerated at the NCJ and found no grievances filed by the plaintiff until January 3, 2006 and January 13, 2006. *Id.*, ¶¶ 15–16. Additionally, Capt. Vendetta stated that it is standard practice for all incoming inmates to receive an inmate handbook that outlines the



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grievance process. *Id.*, ¶ 24. Even if plaintiff did not receive a handbook, the grievance process is outlined in reference books available in the NCJ law library. *Id.*, ¶ 25. All officers in the housing units are familiar with the grievance process and are instructed to provide grievance forms to any inmate wishing to report a problem. *Id.*, ¶ 26.

In further support of the motion for summary judgment, Dr. James Hohensee stated that at the NCJ, the use of narcotics for pain control is strictly scrutinized (Item 59, att. 17, ¶ 14). In a correctional facility, there is a preference for non-narcotic pain management, if medically possible, but narcotics are prescribed in some cases. *Id.*, ¶ 15. The detoxification protocol at the NCJ in 2005 consisted of a set of standing orders. *Id.*, ¶ 17. The order to place plaintiff on the detox protocol was given by Nurse Practitioner Christopher Aikin and carried out by Rebecca Mahar, a jail nurse. *Id.*, ¶ 18. Thereafter, Dr. Hohensee reviewed plaintiff's chart and countersigned the detox order. *Id.*, ¶ 19. Dr. Hohensee saw plaintiff on June 28, 2005 for a scheduled follow-up visit. Plaintiff complained that the [Ultracet](#) he was prescribed was not helping his pain and that he had swelling in his legs. *Id.*, ¶ 22. Dr. Hohensee did not believe narcotics were clinically warranted and chose to add 600 mg. of [Motrin](#) to be given three times per day. *Id.*, ¶ 23. On December 2, 2005, Dr. Hohensee saw plaintiff for sinus complaints. *Id.*, ¶ 25. Dr. Hohensee saw plaintiff on December 30, 2006 for complaints of knee pain. He saw no evidence of acute injury and did not feel additional medication was necessary. *Id.*, ¶ 28. Dr. Hohensee saw plaintiff for the last time on January 27, 2006. Plaintiff complained of nosebleeds associated with his use of a CPAP machine. *Id.*, ¶ 27.

\*4 In his affidavit, Christopher Aikin stated that he practices medicine at the NCJ in collaboration with Dr. Hohensee. As a licensed nurse practitioner, he may examine patients, write prescriptions, and order tests (Item 59, att. 18, ¶ 8). On May 11, plaintiff was booked at the NCJ and was evaluated by Rebecca Mahar, R.N. *Id.*, ¶ 14. At NJC, narcotic medications are strictly regulated, although there is no blanket prohibition against their use when medically necessary. *Id.*, ¶ 17. Mr. Aikin examined plaintiff on May 12, 2005. He confirmed that plaintiff was appropriately on the detox protocol, requested plaintiff's medical records from his neurosurgeon, and determined that narcotic pain medication was not medically necessary. *Id.*, ¶ 19. On May 13, 2005, plaintiff denied detox symptoms, told Mr.

Aikin that he had taken only dose of [oxycontin](#) in the last 14 days, and requested to be removed from the detox protocol. *Id.*, ¶ 21. On May 16, 2005, Mr. Aikin ordered [Zestril](#) for plaintiff's [hypertension](#). *Id.*, ¶ 23. On May 19, 2005, Mr. Aikin saw plaintiff again, discontinued the [Zestril](#), ordered [Imodium](#) for gastrointestinal complaints, and prescribed [Ultracet](#) for pain. *Id.*, ¶ 25. On June 3, 2005, Mr. Aikin increased the dosage of [Ultracet](#). *Id.*, ¶ 27. On June 14, 2005, Mr. Aikin saw plaintiff, who complained of constipation. Mr. Aikin ordered magnesium citrate and advised plaintiff to increase his fruit and vegetable intake. *Id.*, ¶ 28. Upon his return to the NCJ in October 2005, plaintiff had lost 75 pounds, no longer needed blood pressure medication, and was taking only [Ibuprofen](#) for pain. *Id.*, ¶¶ 31–33. He was seen by Mr. Aikin on October 12, 2005 for treatment of a [sebaceous cyst](#) and for sinus problems. *Id.*, ¶ 34. He was seen again on November 15, 2005 for sinus complaints, at which time Mr. Aikin prescribed a different allergy medication. *Id.*, ¶ 35. On December 16, 2006, plaintiff was seen by Mr. Aikin, complaining of knee pain. Mr. Aikin tested the knee for [ligament tears](#) and ordered x-rays. *Id.*, ¶ 38. The last time Mr. Aikin saw the plaintiff was on January 6, 2006 for a follow-up visit regarding his knee. The x-ray was negative for fracture but indicated [osteoarthritis](#). *Id.*, ¶ 41. During plaintiff's second incarceration, he never presented in sick call for complaints related to neck or back pain. *Id.*, ¶ 42.

Dr. Paul Adler reviewed plaintiff's records from the NCJ, the Federal Bureau of Prisons, and the Northeast Ohio Correctional Center, the amended complaint, plaintiff's responses to interrogatories, and his deposition testimony. He stated that “it is well within the standard of care for nurse practitioners to see and treat patients with the plaintiff's medical issues both in and out of a correctional setting.” (Adler Aff., ¶ 13). It is also standard practice in the hospital or correctional setting for a nurse to execute a telephone order from a physician or nurse practitioner. *Id.*, ¶ 16. Dr. Adler stated that Mr. Aikin's initial examination of plaintiff on May 12, 2005 was consistent with the standard of care and his order to begin detoxification was “within good medical judgment.” *Id.*, ¶ 20. During plaintiff's initial incarceration at NCJ, defendants Aikin and Hohensee evaluated and addressed plaintiff's various medical issues, changing and/or increasing his pain medication as needed. *Id.*, ¶ 33. Additionally, during his subsequent incarceration at NCJ, plaintiff's complaint regarding knee pain was appropriately evaluated. *Id.*, ¶¶ 43, 47, 49.

\*5 Dr. Adler stated that detoxification in correctional facilities is a “standard intervention,” and the “decision of whether to prescribe narcotic versus non-narcotic pain relief is in the judgment of the prescribing physician.” (Adler Aff., ¶ 52). The plaintiff was seen in sick call 14 times during the less-than six months he was housed at the NCJ, and was seen and treated for various reasons, including detoxification, pain, edema, hypertension, diabetes, sleep apnea, rhinitis, and knee pain. *Id.*, ¶ 56. In Dr. Adler's opinion, the medical care rendered to plaintiff by defendants Hohensee and Aikin “reflects not deliberate indifference, but clearly health care that is consistent with the applicable standard of care.” *Id.*, ¶ 57.

In her affidavit, defendant Mahar stated that she followed medical orders provided to her by the Chief Medical Officer or the nurse practitioner. She never deviated from these orders and merely dispensed medication that had been prescribed by authorized medical providers (Mahar Aff., ¶¶ 19–20).

Major John T. Saxton, chief administrative officer of the NCJ, stated in an affidavit that the NCJ does not have, nor did it have at any time relevant to this litigation, a blanket prohibition preventing the Chief Medical Officer, Dr. James Hohensee, or Nurse Practitioner Aikin from prescribing narcotic pain medication in appropriate circumstances (Item 60, att. 8, ¶ 6). It is the policy of the NCJ to provide narcotic pain medication “when and if such medication is medically necessary.” *Id.*, ¶ 7.

## DISCUSSION

### 1. Summary Judgment Standard

Rule 56 provides that, “[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(a). Although the language of this Rule has been amended in recent years, the well-settled standards for considering a motion for summary judgment remain unchanged. *See, e.g., Faulkner v. Arista Records LLC*, 797 F.Supp.2d 299, 311 n. 7 (S.D.N.Y.2011). Under those standards, the party seeking summary judgment bears the initial burden of establishing that no genuine issue of material fact exists. *Rockland Exposition, Inc. v. Great American Assur.*

*Co.*, 746 F.Supp.2d 528, 532 (S.D.N.Y.2010), *aff'd*, 445 Fed.Appx. 387 (2d Cir.2011). A “genuine issue” exists “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A fact is “material” if it “might affect the outcome of the suit under the governing law ....” *Id.*

Once the court determines that the moving party has met its burden, the burden shifts to the opposing party to “come forward with specific facts showing that there is a genuine issue for trial.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (internal quotation marks and citation omitted). The nonmoving party may not rest upon mere conclusory allegations or denials, but must set forth “concrete particulars showing that a trial is needed ....” *R.G. Group, Inc. v. Horn & Hardart Co.*, 751 F.2d 69, 77 (2d Cir.1984) (internal quotation marks and citation omitted) (quoted in *Kaminski v. Anderson*, 792 F.Supp.2d 657, 662 (W.D.N.Y.2011)). In considering whether these respective burdens have been met, the court “is not to weigh the evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments.” *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 122 (2d Cir.2004) (internal quotation marks and citation omitted).

\*6 The court recognizes its duty to “extend extra consideration” to *pro se* plaintiffs and that “*pro se* parties are to be given special latitude on summary judgment motions.” *Bennett v. Goord*, 2006 WL 2794421, at \*3 (W.D.N.Y. Aug.1, 2006), *aff'd*, 2008 WL 5083122 (2d Cir.2008) (quoting *Salahuddin v. Coughlin*, 999 F.Supp. 526, 535 (S.D.N.Y.1998)); *see also McPherson v. Coombe*, 174 F.3d 276, 280 (2d Cir.1999) (*pro se* party's pleadings should be read liberally and interpreted “to raise the strongest arguments that they suggest”). “Nevertheless, proceeding *pro se* does not otherwise relieve a litigant from the usual requirements of summary judgment, and a *pro se* party's ‘bald assertion,’ unsupported by evidence, is not sufficient to overcome a motion for summary judgment.” *Cole v. Artuz*, 1999 WL 983876, at \*3 (S.D.N.Y. October 28, 1999) (citing cases).

The defendants contend that summary judgment should be granted dismissing the complaint as plaintiff failed

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to exhaust his administrative remedies in accordance with the grievance procedures in place at the NCJ. Additionally, they argue that plaintiff has not shown deliberate indifference to his medical needs. Plaintiff contends that administrative remedies were unavailable to him as he was unaware of the grievance procedures at the NCJ and was never given an inmate handbook. He also argues that the defendants violated the Eighth Amendment by interfering with his ongoing treatment for pain related to his spinal surgeries, by denying him narcotic pain medication, and by providing medical evaluation and treatment by a registered nurse and nurse practitioner.

## 2. Exhaustion of Administrative Remedies

The Prisoner Litigation Reform Act of 1995 (“PLRA”), mandates exhaustion by prisoners of all administrative remedies before bringing an action regarding prison conditions. *See* 42 U.S.C. § 1997e(a). Specifically, the PLRA provides that “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” *Id.* The Supreme Court has held that the PLRA’s “exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.” *Smart v. Goord*, 441 F.Supp.2d 631, 636 (S.D.N.Y.2006) (quoting *Porter v. Nussle*, 534 U.S. 516, 532, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002)). Failure to exhaust is an absolute bar to an inmate’s action in federal court; section 1997e(a) “requires exhaustion of available administrative remedies before inmate-plaintiffs may bring their federal claims to court at all.” *Neal v. Goord*, 267 F.3d 116, 122 (2d Cir.2001), *overruled on other grounds by Porter v. Nussle*, 534 U.S. 516, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002).

In assessing the affirmative defense of non-exhaustion, the Second Circuit employs a three-part inquiry. *See Hemphill v. New York*, 380 F.3d 680, 686 (2d Cir.2004). A court must (1) determine whether administrative remedies were in fact “available” to the prisoner; (2) consider whether the defendant has forfeited the affirmative defense of non-exhaustion or is estopped from raising it; and (3) determine whether “special circumstances” justify the prisoner’s failure to comply with administrative procedural requirements. *Id.* “Courts should be careful to

look at the applicable set of grievance procedures, whether city, state or federal” in assessing availability. *Mojias v. Johnson*, 351 F.3d 606, 610 (2d Cir.2003).

\*7 In New York, formal exhaustion for prisoners in county jails requires compliance with the three-step grievance and appeal procedure outlined in the New York State Minimum Standards for Management of County Jails. *See* N.Y. Comp.Codes R. & Regs. tit. 9 (“9 N.Y.C.R.R.”), § 7032.1. In this case, the NCJ employed a three-tiered grievance process with review of an inmate’s complaint by the grievance coordinator, the Chief Administrative Officer of the facility, and finally the New York State Commission of Correction. Generally, “[a] prisoner has not exhausted his administrative remedies until he goes through all three levels of the grievance procedure.” *Hairston v. LaMarche*, 2006 WL 2309592, at \*7 (S.D.N.Y. August 10, 2006) (citing cases).

Here, as stated by Capt. Vendetta, there was a grievance procedure in place at the NJC that was available to plaintiff (Item 60, att. 7, ¶ 5). Pursuant to this policy, an inmate must complete and submit a grievance within five days of the act or occurrence giving rise to the grievance. *Id.*, ¶ 9. Capt. Vendetta stated he reviewed the grievance file for the relevant time period and found no formal grievances filed by the plaintiff between May 11 and July 5, 2005, the dates of his initial incarceration at the NCJ. *Id.*, ¶ 16. On January 3, 2006, plaintiff filed a grievance claiming that the NCJ seized oxycontin and oxycodone upon his initial admission to the NJC and that he was unlawfully placed on the detox protocol in May 2005. *Id.*, ¶ 17. Capt. Vendetta stated that this grievance was untimely, as it referenced events that occurred significantly more than five days prior to its filing. Despite the untimeliness, the grievance was processed through the system. *Id.*, ¶ 20.

Plaintiff contends that he did not file a timely grievance because he was unaware of the grievance procedure and was never issued an inmate handbook upon his admission to the NJC. Grievance procedures may be deemed unavailable “where plaintiff is unaware of the grievance procedures or did not understand [them] or where defendants’ behavior prevents plaintiff from seeking administrative remedies.” *Murray v. Palmer*, 2010 WL 1235591, at \*5 (N.D.N.Y. March 31, 2010); *Hargrove v. Riley*, 2007 WL 389003, at \*8 (E.D.N.Y. January 31, 2007). Here, there is no dispute that plaintiff had not spent



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a significant amount of time in custody in New York State. While he signed an intake form acknowledging his receipt of an inmate handbook on both of his admissions to the NCJ, plaintiff stated that he signed the form without reading it and because he was told to do so by the admitting officer. He was unaware of the grievance policies and procedures until approximately December 2005, when he read the grievance policy in the law library. Construing the facts in the light most favorable to plaintiff, he has raised a material fact as to whether a similarly situated person would have been unaware of the grievance process, rendering it unavailable. See *Brown v. Fischer*, 2010 WL 5797359 (N.D.N.Y. December 8, 2010) (failure to exhaust administrative remedies was excusable where inmate was unaware of the grievance procedures and there was no evidence he received an inmate handbook). Accordingly, the defendants' motions for summary judgment based on the plaintiff's failure to exhaust administrative remedies are denied.

### 3. Constitutional Claims

\*8 Even excusing plaintiff's failure to exhaust his administrative remedies, the complaint must nonetheless be dismissed as plaintiff has failed to establish a violation of the Eighth Amendment.

Title 42 U.S.C. § 1983 provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ....

42 U.S.C. § 1983. “In order to maintain a section 1983 action, two essential elements must be present: (1) the conduct complained of must have been committed by a person acting under color of state law; and (2) the conduct complained of must have deprived a person of rights, privileges, or immunities secured by the Constitution or

laws of the United States.” *Pitchell v. Callan*, 13 F.3d 545, 547 (2d Cir.1994); see also *Kasim v. Guzman*, 2011 WL 4352387, at \*3 (W.D.N.Y. September 16, 2011).

“The Eighth Amendment's prohibition against cruel and unusual punishment has been construed to include the denial of adequate medical care for an inmate's serious medical needs.” *Woods v. Goord*, 2002 WL 31296325, \*2 (S.D.N.Y. October 10, 2002); see also *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994); *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). The care provided to prisoners to treat their injuries or illnesses must meet minimum medical standards of adequacy and be reasonably intended to satisfy their medical needs. To show that prison medical treatment was so inadequate as to amount to “cruel or unusual punishment” prohibited by the Eighth Amendment, plaintiff must prove that defendants' actions or omissions amounted to “deliberate indifference to serious medical needs.” *Estelle v. Gamble*, 429 U.S. at 106; *Harrison v. Barkley*, 219 F.3d 132, 136 (2d Cir.2000).

Under 42 U.S.C. § 1983, every claim for deliberate indifference to a serious medical need must pass a two-pronged test consisting of objective and subjective elements. First, the court must determine whether, objectively speaking, plaintiff's condition is such that the alleged deprivation of medical assistance is “sufficiently serious.” *Woods*, 2002 WL 31296325, at \*3 (citing *Hathaway v. Coughlin*, 37 F.3d 63, 66–67 (2d Cir.1994)); see also *Wilson v. Seiter*, 501 U.S. 294, 298, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991). Second, the court must consider whether the official “‘knew that an inmate faced a substantial risk of serious harm, and disregarded that risk by failing to take reasonable measures to abate it.’” *Woods* 2002 WL 31296325 at \*3 (internal cites and alterations omitted); *Harrison v. Barkley*, 219 F.3d at 137.

A serious medical need is one with some urgency or one which, if ignored, may produce death, degeneration, or extreme pain. *Hathaway*, 37 F.3d at 66. As the Second Circuit held in *Brock v. Wright*, 315 F.3d 158, 162 (2d Cir.2003), there is no precise metric to guide the court in its estimation of the seriousness of a prisoner's medical condition. Any inquiry into the objective component of an Eighth Amendment claim must be tailored to the specific facts of each case. *Smith v. Carpenter*, 316 F.3d 178, 185 (2d Cir.2003). In *Chance v. Armstrong*, 143 F.3d 698, 702

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(2d Cir.1998), the court set forth a non-exhaustive list of factors that are relevant to the inquiry whether a given medical condition is serious. These factors include: (1) whether a reasonable doctor or patient would perceive the medical need in question as “important and worthy of comment or treatment;” (2) whether the medical condition significantly affects daily activities; and (3) “the existence of chronic and substantial pain.” *Chance*, 143 F.3d at 702.

\*9 Plaintiff’s medical conditions included pain as a result of previous spinal surgeries, edema from a blood pressure medication, and knee pain. He acknowledges that the defendants adequately responded to his complaints of allergic rhinitis and sleep apnea. Edema and knee pain are not sufficiently serious to cause death, degeneration, or extreme pain. Accordingly, the plaintiff’s only medical conditions that are arguably “serious” relate to plaintiff’s pain resulting from his previous spinal surgeries.

Even if the court were to assume that plaintiff’s pain as a result of multiple spinal surgeries constituted a serious medical need, there is no evidence of defendants’ deliberate indifference to that medical need. Plaintiff’s Eighth Amendment claim is based on his assumption that there is a policy against the prescription of any and all narcotic pain medications in the NCJ. He complains that defendant Mahar ordered the detox protocol and that Major Saxton, the Chief Administrative Officer of the NCJ, implemented a policy of no narcotic pain medication. Plaintiff offers no proof to support these factual assumptions. In contrast, the defendants have established that there is no blanket prohibition against the prescription of narcotic medications and that Nurse Mahar initiated the detox protocol upon the order of Nurse Practitioner Aikin.

Plaintiff also complains that he was not seen by Dr. Hohensee until June 28, 2005, 48 days after his arrival at the NCJ. He argues that given his serious medical need, he should have been seen by a physician earlier. “A difference of opinion between a prisoner and prison officials regarding medical treatment does not, as a matter of law, constitute deliberate indifference.” *Sonds v. St. Barnabas Hosp. Corr. Health Serv.*, 151 F.Supp.2d 303, 311 (S.D.N.Y.2001); see also *Chance*, 143 F.3d 698 at 703; *McCloud v. Delaney*, 677 F.Supp. 230, 232 (S.D.N.Y.1988) (“[T]here is no right to the medical treatment of one’s choice if the prescribed treatment is based on applicable medical standards.”). Additionally,

“[m]ere delay in the rendering of medical treatment in and of itself does not rise to the level of a constitutional violation.” *Smith v. Montefiore Med. Ctr.-Health Serv. Div.*, 22 F.Supp.2d 275, 280 (S.D.N.Y.1998). “Nor does the fact that an inmate might prefer an alternative treatment, or feels that he did not get the level of medical attention he preferred.” *Sonds*, 151 F.Supp.2d at 311; see also *Dean v. Coughlin*, 804 F.2d 207, 215 (2d Cir.1986). “To demonstrate a constitutional violation, a plaintiff must show that he sustained substantial harm because of the delay in the rendering of medical treatment.” *Smith*, 22 F.Supp.2d at 280. “As long as the medical care is adequate, there is no Eighth Amendment violation.” *Sonds*, 151 F.Supp.2d at 311; see also *Wandell v. Koenigsmann*, 2000 WL 1036030, \*3 (S.D.N.Y. July 27, 2000) (“So long as the treatment given is adequate, the fact that a prisoner might prefer a different treatment does not give rise to an Eighth Amendment violation.”).

\*10 Additionally, plaintiff contends that the medical staff of the NCJ improperly interfered with his treatment by his personal physician by discontinuing his use of *oxycontin* and *oxycodone* and placing him on the detox protocol. Plaintiff’s assertion that he should have been given narcotic pain medication is likewise a disagreement over the course of treatment. “[M]ere disagreement over the proper treatment does not create a constitutional claim.” *Chance*, 143 F.3d at 703. Although plaintiff claims that the defendants ignored and overruled the treatment plan in place when he entered NCJ, an inmate is not entitled to the treatment of his choice. *Id.* at 702. Plaintiff’s demand for narcotic pain medications and defendants’ unwillingness to prescribe them does not create an Eighth Amendment claim. See *Ifill v. Weinstock*, 2012 WL 162405, \*4 (W.D.N.Y. January 19, 2012); *Guarneri v. Wood*, 2011 WL 4592209, at \*13 (N.D.N.Y. September 2, 2011) (“Defendants regularly offered [plaintiff] non-narcotic pain medication ..... [Plaintiff]’s complaints about the type of medication given to him for pain again amounts to a disagreement over treatment, which is insufficient to allege a constitutional violation.”).

In this case, plaintiff was seen by a registered nurse on the day of his admission. He was seen by Nurse Practitioner Aikin on May 12, 13, 16, and 19, 2005, June 3 and 14, 2005, October 12, 2005, November 15, 2005, December 16, 2005, and January 6, 2006. He was seen by Dr. Hohensee on June 28, 2005, December 2, and 30, 2005, and January 27, 2005. He received medication, medical advice, diagnostic

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x-rays, and followup care with a physician. Even granting plaintiff the benefit of every favorable inference, it cannot be said that this medical care was inadequate or evinces deliberate indifference on the part of the defendants. Based on the foregoing, no reasonable jury could find that the defendants acted with deliberate indifference to plaintiff's medical needs in violation of his rights under the Eighth and Fourteenth Amendments. Accordingly, defendants are entitled to summary judgment as a matter of law dismissing plaintiff's complaint. The court need not address the argument that the defendants are entitled to qualified immunity.

### CONCLUSION

The defendants' motions for summary judgment (Items 59, 60) are granted and the complaint is dismissed. Plaintiff's cross motion for summary judgment (Item 62)

is denied. The Clerk of the Court is directed to enter judgment in favor of defendants and to close this case.

The Court hereby certifies, pursuant to [28 U.S.C. § 1915\(a\)\(3\)](#), that any appeal from this Order would not be taken in good faith, and leave to appeal to the Court of Appeals as a poor person is denied. *Coppedge v. United States*, 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962). Further requests to proceed on appeal as a poor person should be directed, on motion, to the United States Court of Appeals for the Second Circuit, in accordance with [Rule 24 of the Federal Rules of Appellate Procedure](#).

**\*11** So Ordered.

### All Citations

Not Reported in F.Supp.2d, 2012 WL 3230435

### Footnotes

- 1 This factual statement is taken from the plaintiff's medical and grievance records (Item 59, Exhs. G, J–M), the plaintiff's deposition testimony (Item 59, Exh. H), the affidavits of James Hohensee, M.D., Christopher Aikin, N.P. and Paul Adler, D.O., with exhibits (Item 59, atts. 17–21), and the affidavits of Rebecca Mahar, Duane Vendetta, and John T. Saxton (Item 60, atts. 6–8).

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**This decision was reviewed by West editorial staff and not assigned editorial enhancements.**

United States District Court,  
N.D. New York.

James MURRAY, Plaintiff,

v.

R. PALMER; S. Griffin; M. Terry;  
F. Englese; Sergeant Edwards; K.  
Bump; and K.H. Smith, Defendants.

No. 9:03-CV-1010 (GTS/GHL).

|  
March 31, 2010.

#### Attorneys and Law Firms

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Hon. [Andrew M. Cuomo](#), Attorney General for the State  
of New York, [Timothy Mulvey, Esq.](#), [James Seaman,](#)  
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NY, for Defendants.

#### DECISION and ORDER

Hon. [GLENN T. SUDDABY](#), District Judge.

\*1 The trial in this prisoner civil rights action, filed *pro se* by James Murray (“Plaintiff”) pursuant to [42 U.S.C. § 1983](#), began with an evidentiary hearing before the undersigned on March 1, 2010, regarding the affirmative defense of seven employees of the New York State Department of Correctional Services—R. Palmer, S. Griffin, M. Terry, F. Englese, Sergeant Edwards, K. Bump, and K.H. Smith (“Defendants”)—that Plaintiff failed to exhaust his available administrative remedies, as required by the Prison Litigation Reform Act, before filing this action on August 14, 2003. At the hearing, documentary evidence was admitted, and testimony

was taken of Plaintiff as well as Defendants’ witnesses (Darin Williams, Sally Reams, and Jeffery Hale), whom Plaintiff was able to cross-examine through *pro bono* trial counsel. At the conclusion of the hearing, the undersigned indicated that a written decision would follow. This is that written decision. For the reasons stated below, Plaintiff’s Second Amended Complaint is dismissed because of his failure to exhaust his available administrative remedies.

#### I. RELEVANT LEGAL STANDARD

The Prison Litigation Reform Act of 1995 (“PLRA”) requires that prisoners who bring suit in federal court must first exhaust their available administrative remedies: “No action shall be brought with respect to prison conditions under [§ 1983](#) ... by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” [42 U.S.C. § 1997e](#). The PLRA was enacted “to reduce the quantity and improve the quality of prisoner suits” by “afford[ing] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case.” [Porter v. Nussle](#), 534 U.S. 516, 524-25, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002). In this regard, exhaustion serves two major purposes. First, it protects “administrative agency authority” by giving the agency “an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court, and it discourages disregard of the agency’s procedures.” [Woodford v. Ngo](#), 548 U.S. 81, 89, 126 S.Ct. 2378, 165 L.Ed.2d 368 (2006). Second, exhaustion promotes efficiency because (a) “[c]laims generally can be resolved much more quickly and economically in proceedings before an agency than in litigation in federal court,” and (b) “even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration.” [Woodford](#), 548 U.S. at 89. “[T]he PLRA’s exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.” [Porter](#), 534 U.S. at 532.

In accordance with the PLRA, the New York State Department of Correctional Services (“DOCS”) has made available a well-established inmate grievance program. [7 N.Y.C.R.R. § 701.7](#). Generally, the DOCS Inmate Grievance Program (“IGP”) involves the following three-step procedure for the filing of grievances. [7 N.Y.C.R.R.](#)

§§ 701.5, 701.6(g), 701.7.<sup>1</sup> First, an inmate must file a complaint with the facility's IGP clerk within a certain number of days of the alleged occurrence.<sup>2</sup> If a grievance complaint form is not readily available, a complaint may be submitted on plain paper. A representative of the facility's inmate grievance resolution committee ("IGRC") has a certain number of days from receipt of the grievance to informally resolve the issue. If there is no such informal resolution, then the full IGRC conducts a hearing within a certain number of days of receipt of the grievance, and issues a written decision within a certain number of days of the conclusion of the hearing. Second, a grievant may appeal the IGRC decision to the facility's superintendent within a certain number of days of receipt of the IGRC's written decision. The superintendent is to issue a written decision within a certain number of days of receipt of the grievant's appeal. Third, a grievant may appeal to the central office review committee ("CORC") within a certain number of days of receipt of the superintendent's written decision. CORC is to render a written decision within a certain number of days of receipt of the appeal.

\*2 Moreover, there is an expedited process for the review of complaints of inmate harassment or other misconduct by corrections officers or prison employees. 7 N.Y.C.R.R. § 701.8. In the event the inmate seeks expedited review, he or she may report the misconduct to the employee's supervisor. The inmate then files a grievance under the normal procedures outlined above, but all grievances alleging employee misconduct are given a grievance number, and sent immediately to the superintendent for review. Under the regulations, the superintendent or his designee shall determine immediately whether the allegations, if true, would state a "bona fide" case of harassment, and if so, shall initiate an investigation of the complaint, either "in-house," by the Inspector General's Office, or by the New York State Police Bureau of Criminal Investigations. An appeal of the adverse decision of the superintendent may be taken to the CORC as in the regular grievance procedure. A similar "special" procedure is provided for claims of discrimination against an inmate. 7 N.Y.C.R.R. § 701.9.

It is important to note that these procedural requirements contain several safeguards. For example, if an inmate could not file such a complaint within the required time period after the alleged occurrence, he or she could apply to the facility's IGP Supervisor for an exception to the

time limit based on mitigating circumstances. If that application was denied, the inmate could file a complaint complaining that the application was wrongfully denied.<sup>3</sup> Moreover, any failure by the IGRC or the superintendent to timely respond to a grievance or first-level appeal, respectively, can-and must-be appealed to the next level, including CORC, to complete the grievance process.<sup>4</sup> There appears to be a conflict in case law regarding whether the IGRC's nonresponse must be appealed to the superintendent where the plaintiff's grievance was never assigned a grievance number.<sup>5</sup> After carefully reviewing this case law, the Court finds that the weight of authority appears to answer this question in the affirmative.<sup>6</sup> The Court notes that, if the plaintiff adequately describes, in his appeal to the superintendent, the substance of his grievance (or if the plaintiff attaches, to his appeal, a copy of his grievance), it would appear that there is something for the superintendent to review.

It is also important to note that DOCS has a *separate and distinct* administrative appeal process for inmate misbehavior hearings:

- A. For Tier III superintendent hearings, the appeal is to the Commissioner's designee, Donald Selsky, D.O.C.S. Director of Special Housing/Inmate Disciplinary Program, pursuant to 8 N.Y.C.R.R. § 254.8;
- B. For Tier II disciplinary hearings, the appeal is to the facility superintendent pursuant to 7 N.Y.C.R.R. § 253.8; and
- C. For Tier I violation hearings, the appeal is to the facility superintendent or a designee pursuant to 7 N.Y.C.R.R. § 252.6.

\*3 "An individual decision or disposition of any current or subsequent program or procedure having a written appeal mechanism which extends review to outside the facility shall be considered nongrievable." 7 N.Y.C.R.R. § 701.3(e)(1). Similarly, "an individual decision or disposition resulting from a disciplinary proceeding ... is not grievable." 7 N.Y.C.R.R. § 701.3(e)(2). However, "[t]he policies, rules, and procedures of any program or procedure, including those above, are grievable." 7 N.Y.C.R.R. § 701.3(e)(3); see also N.Y. Dep't Corr. Serv. Directive No. 4040 at III.E.



Generally, if a prisoner has failed to follow each of the required three steps of the above-described grievance procedure prior to commencing litigation, he has failed to exhaust his administrative remedies. *Ruggiero v. County of Orange*, 467 F.3d 170, 175 (2d Cir.2006) (citing *Porter*, 534 U.S. at 524). However, the Second Circuit has held that a three-part inquiry is appropriate where a defendant contends that a prisoner has failed to exhaust his available administrative remedies, as required by the PLRA. *Hemphill v. State of New York*, 380 F.3d 680, 686, 691 (2d Cir.2004), *accord*, *Ruggiero*, 467 F.3d at 175. First, “the court must ask whether [the] administrative remedies [not pursued by the prisoner] were in fact ‘available’ to the prisoner.” *Hemphill*, 380 F.3d at 686 (citation omitted). Second, if those remedies were available, “the court should ... inquire as to whether [some or all of] the defendants may have forfeited the affirmative defense of non-exhaustion by failing to raise or preserve it ... or whether the defendants' own actions inhibiting the [prisoner's] exhaustion of remedies may estop one or more of the defendants from raising the plaintiff's failure to exhaust as a defense.” *Id.* [citations omitted]. Third, if the remedies were available and some of the defendants did not forfeit, and were not estopped from raising, the non-exhaustion defense, “the Court should consider whether ‘special circumstances’ have been plausibly alleged that justify the prisoner's failure to comply with the administrative procedural requirements.” *Id.* [citations and internal quotations omitted].

With regard to this third inquiry, the Court notes that, *under certain circumstances*, an inmate may exhaust his administrative remedies by raising his claim during a related *disciplinary proceeding*. *Giano v. Goord*, 380 F.3d 670, 678-79 (2d Cir.2004); *Johnson v. Testman*, 380 F.3d 691, 697 (2d Cir.2004).<sup>7</sup> However, in essence, the circumstances in question include instances in which (1) the inmate reasonably believed that his “only available remedy” was to raise his claim as part of a tier disciplinary hearing,<sup>8</sup> and (2) the inmate articulated and pursued his claim in the disciplinary proceeding in a manner that afforded prison officials the time and opportunity to thoroughly investigate that claim.<sup>9</sup> Some district courts have found the first requirement not present where (a) there was nothing objectively confusing about the DOCS regulations governing the grievability of his claim,<sup>10</sup> (b) the inmate was specifically informed that the claim in question was grievable,<sup>11</sup> (c) the inmate separately

pursued the proper grievance process by filing a grievance with the IGRC,<sup>12</sup> (d) by initially alleging that he did appeal his claim to CORC (albeit without proof), the inmate has indicated that, during the time in question, he understood the correct procedure for exhaustion,<sup>13</sup> and/or (e) before and after the incident in question, the inmate pursued similar claims through filing a grievance with the IGRC.<sup>14</sup> Other district courts have found the second requirement not present where (a) the inmate's mention of his claim during the disciplinary hearing was so insubstantial that prison officials did not subsequently investigate that claim,<sup>15</sup> and/or (b) the inmate did not appeal his disciplinary hearing conviction.<sup>16</sup>

\*4 Finally, two points bear mentioning regarding exhaustion. First, given that non-exhaustion is an affirmative defense, the defendant bears the burden of showing that a prisoner has failed to exhaust his available administrative remedies. *See, e.g., Sease v. Phillips*, 06-CV-3663, 2008 WL 2901966, \*4 (S.D.N.Y. July 25, 2008). However, once a defendant has adduced reliable evidence that administrative remedies were available to Plaintiff and that Plaintiff nevertheless failed to exhaust those administrative remedies, Plaintiff must then “counter” Defendants' assertion by showing exhaustion, unavailability, estoppel, or “special circumstances.”<sup>17</sup>

Second, the Court recognizes that there is case law from within the Second Circuit supporting the view that the exhaustion issue is one of fact, which should be determined by a jury, rather than by the Court.<sup>18</sup> However, there is also case law from within the Second Circuit supporting the view that the exhaustion issue is one of law, which should be determined by the Court, rather than by a jury.<sup>19</sup> After carefully reviewing the case law, the Court finds that the latter case law—which includes cases from the Second Circuit and this District—outweighs the former case law.<sup>20</sup> (The Court notes that the latter case law includes cases from the Second Circuit and this District.)<sup>21</sup> More importantly, the Court finds that the latter cases are better reasoned than are the former cases. In particular, the Court relies on the reasons articulated by the Second Circuit in 1999: “Where administrative remedies are created by statute or regulation affecting the governance of prisons, ... the answer depends on the meaning of the relevant statute or regulation.” *Snider v. Melendez*, 199 F.3d 108, 113-14 (2d Cir.1999). The Court relies also

on the several reasons articulated by Judge Richard A. Posner in a recent Seventh Circuit decision: most notably, the fact that the exhaustion-of-administrative-remedies inquiry does not address the merits of, or deadlines governing, the plaintiff's claim but an issue of "judicial traffic control" (i.e., what forum a dispute is to be resolved in), which is never an issue for a jury but always an issue for a judge. See *Pavey v. Conley*, 544 F.3d 739, 740-42 (7th Cir.2008) (en banc), cert. denied, --- U.S. ---, 129 S.Ct. 1620, 173 L.Ed.2d 995 (2009). The Court notes that the First, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth and Eleventh Circuits appear to agree with the ultimate conclusion of the Second and Seventh Circuits that the exhaustion issue is properly decided by a judge, not a jury.<sup>22</sup>

## II. ANALYSIS

As an initial matter, Plaintiff argues that he exhausted his administrative remedies regarding the claims at issue in this action, by filing a grievance regarding those claims, and then appealing the non-response to that grievance all the way to CORC. Because the Court rejects this argument based on the evidence adduced at the hearing, the Court proceeds to an analysis of the three-step exhaustion inquiry established by the Second Circuit.

### A. Availability of Administrative Remedies

\*5 New York prison inmates are subject to an Inmate Grievance Program established by DOCS and recognized as an "available" remedy for purposes of the PLRA. See *Mingues v. Nelson*, 96-CV-5396, 2004 WL 324898, at \*4 (S.D.N.Y. Feb.20, 2004) (citing *Mojias v. Johnson*, 351 F.3d 606 (2d Cir.2003), and *Snider v. Melindez*, 199 F.3d 108, 112-13 [2d Cir.1999] ). There are different circumstances under which the grievance procedure is deemed not to have been available to an inmate plaintiff. *Hemphill*, 380 F.3d at 687-88. For example, courts have found unavailability "where plaintiff is unaware of the grievance procedures or did not understand it or where defendants' behavior prevents plaintiff from seeking administrative remedies." *Hargrove v. Riley*, 04-CV-4587, 2007 WL 389003, at \*8 (E.D.N.Y. Jan.31, 2007) (internal citations omitted). When testing the availability of administrative remedies in the face of claims that undue influence from prison workers has caused a plaintiff inmate to forego the formal grievance process, courts employ an objective test, examining whether "a similarly situated individual of ordinary firmness [would]

have deemed them available." *Hemphill*, 380F.3d at 688 (quotations and citations omitted); see *Hargrove*, 2007 WL 389003, at \*8.

Here, after carefully considering the evidence submitted at the hearing in this action on March 1, 2010, the Court finds that administrative remedies were "available" to Plaintiff during the time in question. The Court makes this finding for the following four reasons.

First, in his sworn Complaint (which has the force and effect of an affidavit), Plaintiff stated, "Yes," in response to the question, "Is there a prisoner grievance procedure at this facility ." (Dkt. No. 1, ¶ 4.a.)<sup>23</sup> Second, both Darin Williams (the corrections officer in charge of the special housing unit during the relevant time period) and Sally Reams (the Inmate grievance program supervisor during the relevant time period) testified credibly, at the exhaustion hearing, that there was a working grievance program at Great Meadow Correctional Facility during the time in question. (Hearing Tr. at 10, 12, 14-21, 40-54.) Third, Plaintiff testified, at the exhaustion hearing that, during this approximate time period (the August to November of 2000), he filed at least three other grievances Great Meadow Correctional Facility, to which he received responses from the inmate grievance clerk, the Superintendent, and CORC. (*Id.* at 154, 157-58, 169-70; see also Hearing Exs. D-4, D-5, P-8, P-13, P-14.)<sup>24</sup> Fourth, the Court finds the relevant portions of Plaintiff's hearing testimony regarding the grievance at issue in this action to be incredible due to various omissions and inconsistencies in that testimony, and his demeanor during the hearing. (*Id.* at 127-34.)<sup>25</sup>

### B. Estoppel

After carefully considering the evidence submitted at the hearing in this action on March 1, 2010, the Court finds that Defendants did not forfeit the affirmative defense of non-exhaustion by failing to raise or preserve it, or by taking actions that inhibited Plaintiff's exhaustion of remedies. For example, Defendants' Answer timely asserted this affirmative defense. (Dkt. No. 35, ¶ 17.) Moreover, Plaintiff failed to offer any credible evidence at the hearing that *Defendant* s in any way interfered with Plaintiff's ability to file grievances during the time in question. (Hearing Tr. at 127-34, 157-58, 169-70.) Generally, a defendant in an action may not be estopped from asserting the affirmative defense of failure to

exhaust administrative remedies based on the actions (or inactions) of other individuals.<sup>26</sup>

### C. Special Circumstances

\*6 There are a variety of special circumstances that may excuse a prisoner's failure to exhaust his available administrative remedies, including (but not limited to) the following:

(1) The facility's "failure to provide grievance deposit boxes, denial of forms and writing materials, and a refusal to accept or forward plaintiff's appeals—which effectively rendered the grievance appeal process unavailable to him." *Sandlin v. Poole*, 575 F.Supp.2d 484, 488 (W.D.N.Y.2008) (noting that "[s]uch facts support a finding that defendants are estopped from relying on the exhaustion defense, as well as "special circumstances" excusing plaintiff's failure to exhaust");

(2) Other individuals' "threats [to the plaintiff] of physical retaliation and reasonable misinterpretation of the statutory requirements of the appeals process." *Clarke v. Thornton*, 515 F.Supp.2d 435, 439 (S.D.N.Y.2007) (noting also that "[a] correctional facility's failure to make forms or administrative opinions "available" to the prisoner does not relieve the inmate from this burden."); and

(3) When plaintiff tries "to exhaust prison grievance procedures[, and] although each of his efforts, alone, may not have fully complied, together his efforts sufficiently informed prison officials of his grievance and led to a thorough investigation of the grievance." *Hairston v. LaMarche*, 05-CV-6642, 2006 WL 2309592, at \*8 (S.D.N.Y. Aug.10, 2006).

After carefully considering the issue, the Court finds that there exists, in this action, no "special circumstances" justifying Plaintiff's failure to comply with the administrative procedural requirements. Construed with the utmost of special leniency, Plaintiff's hearing testimony, and his counsel's cross-examination of Defendants' witnesses, raise the specter of two excuses for not having exhausted his available administrative remedies before he (allegedly) mailed his Complaint in

this action on August 14, 2003:(1) that exhaustion was not possible because of the administrative procedures that DOCS has implemented regarding inmate grievances; and/or (2) that an unspecified number of unidentified corrections officers (who are not Defendants in this action) somehow interfered with the delivery of his grievance and appeals. For example, Plaintiff testified at the exhaustion hearing that he handed his grievance and appeals to various corrections officers making rounds where he was being housed, and that, if his grievance and/or appeals were never received, it must have been because his letters were not properly delivered. (Hearing Tr. at 126-36.)

With regard to these excuses, the Court finds that, while these excuses could constitute special circumstances justifying an inmate's failure to exhaust his available administrative remedies in certain situations,<sup>27</sup> these excuses are not available to Plaintiff in the current action because, as stated in Part II.A. of this Decision and Order, the credible testimony before the Court indicates that Plaintiff did not hand his grievance and appeals to various corrections officers with regard to the claims in question. *See, supra*, Part II.A. of this Decision and Order.<sup>28</sup>

\*7 For all these reasons, the Court finds that Plaintiff's proffered excuse does not constitute a special circumstance justifying his failure to exhaust his available administrative remedies before filing this action.

**ACCORDINGLY**, it is

**ORDERED** that Plaintiff's Second Amended Complaint (Dkt. No. 10) is **DISMISSED in its entirety without prejudice** for failure to exhaust his available administrative remedies before filing this action, pursuant to the PLRA; and it is further

**ORDERED** that the Clerk of the Court shall enter judgment for Defendants and close the file in this action.

### All Citations

Not Reported in F.Supp.2d, 2010 WL 1235591

### Footnotes



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- 1 See also *White v. The State of New York*, 00-CV-3434, 2002 U.S. Dist. LEXIS 18791, at \*6 (S.D.N.Y. Oct 3, 2002).
- 2 The Court uses the term “a certain number of days” rather than a particular time period because (1) since the three-step process was instituted, the time periods imposed by the process have changed, and (2) the time periods governing any particular grievance depend on the regulations and directives pending during the time in question.
- 3 *Groves v. Knight*, 05-CV-0183, Decision and Order at 3 (N.D.N.Y. filed Aug. 4, 2009) (Suddaby, J.).
- 4 7 N.Y.C.R.R. § 701.6(g) (“[M]atters not decided within the time limits may be appealed to the next step.”); *Hemphill v. New York*, 198 F.Supp.2d 546, 549 (S.D.N.Y.2002), vacated and remanded on other grounds, 380 F.3d 680 (2d Cir.2004); see, e.g., DOCS Directive 4040 dated 8/22/03, ¶ VI.G. (“Absent [a time limit extension granted by the grievant], matters not decided within the time limits may be appealed to the next step.”); *Pacheco v. Drown*, 06-CV-0020, 2010 WL 144400, at \*19 & n. 21 (N.D.N.Y. Jan.11, 2010) (Suddaby, J.) (“It is important to note that any failure by the IGRC or the superintendent to timely respond to a grievance or first-level appeal, respectively, can be appealed to the next level, including CORC, to complete the grievance process.”), accord, *Torres v. Caron*, 08-CV-0416, 2009 WL 5216956, at \*5 & n. 28 (N.D.N.Y. Dec.30, 2009) (Mordue, C.J.), *Benitez v. Hamm*, 04-CV-1159, 2009 WL 3486379, at \*13 & n. 34 (N.D.N.Y. Oct.21, 2009) (Mordue, C.J.), *Ross v. Wood*, 05-CV-1112, 2009 WL 3199539, at \*11 & n. 34 (N.D.N.Y. Sept.30, 2009) (Scullin, J.), *Sheils v. Brannen*, 05-CV-0135, 2008 WL 4371776, at \*6 & n. 24 (N.D.N.Y. Sept.18, 2008) (Kahn, J.), *Murray v. Palmer*, 03-CV-1010, 2008 WL 2522324, at \*15 & n. 46 (N.D.N.Y. June 20, 2008) (Hurd, J.), *McCloud v. Tureglio*, 07-CV-0650, 2008 WL 17772305, at \*10 & n. 25 (N.D.N.Y. Apr. 15, 2008) (Mordue, C.J.), *Shaheen v. McIntyre*, 05-CV-0173, 2007 WL 3274835, at \*14 & n. 114 (N.D.N.Y. Nov.5, 2007) (McAvoy, J.); *Nimmons v. Silver*, 03-CV-0671, Report-Recommendation, at 15-16 (N.D.N.Y. filed Aug. 29, 2006) (Lowe, M.J.) (recommending that the Court grant Defendants' motion for summary judgment, in part because plaintiff adduced no evidence that he appealed the lack of a timely decision by the facility's IGRC to the next level, namely to either the facility's superintendent or CORC), adopted by Decision and Order (N.D.N.Y. filed Oct. 17, 2006) (Hurd, J.); *Gill v. Frawley*, 02-CV-1380, 2006 WL 1742738, at \*11 & n. 66 (N.D.N.Y. June 22, 2006) (McAvoy, J.) (“[A]n inmate's mere attempt to file a grievance (which is subsequently lost or destroyed by a prison official) is not, in and of itself, a reasonable effort to exhaust his administrative remedies since the inmate may still appeal the loss or destruction of that grievance.”); *Walters v. Carpenter*, 02-CV-0664, 2004 WL 1403301, at \*3 (S.D.N.Y. June 22, 2004) (“[M]atters not decided within the prescribed time limits must be appealed to the next level of review.”); *Croswell v. McCoy*, 01-CV-0547, 2003 WL 962534, at \*4 (N.D.N.Y. March 11, 2003) (Sharpe, M.J.) (“If a plaintiff receives no response to a grievance and then fails to appeal it to the next level, he has failed to exhaust his administrative remedies as required by the PLRA.”); *Reyes v. Punzal*, 206 F.Supp.2d 431, 433 (W.D.N.Y.2002) (“Even assuming that plaintiff never received a response to his grievance, he had further administrative avenues of relief open to him.”).
- 5 Compare *Johnson v. Tedford*, 04-CV-0632, 616 F.Supp.2d 321, 326 (N.D.N.Y.2007) (Sharpe, J.) (“[W]hen a prisoner asserts a grievance to which there is no response, and it is not recorded or assigned a grievance number, administrative remedies may be completely exhausted, as there is nothing on record for the next administrative level to review.”) [emphasis in original, and citations omitted] with *Waters v. Schneider*, 01-CV-5217, 2002 WL 727025, at \*2 (S.D.N.Y. Apr.23, 2002) (finding that, in order to exhaust his available administrative remedies, plaintiff had to file an appeal with the superintendent from the IGRC's non-response to his grievance, of which no record existed).
- 6 See, e.g., *Murray v. Palmer*, 03-CV-1010, 2008 WL 2522324, at \*16, 18 (N.D.N.Y. June 20, 2008) (Hurd, J., adopting Report-Recommendation of Lowe, M.J.) (finding that, in order to exhaust his available administrative remedies with regard to his grievance of August 30, 2000, plaintiff had to file an appeal with the superintendent from the IGRC's non-response to that grievance, which included a failure to acknowledge the receipt of the grievance and assign it a number); *Midalgo v. Bass*, 03-CV-1128, 2006 WL 2795332, at \*7 (N.D.N.Y. Sept.26, 2006) (Mordue, C.J., adopting Report-Recommendation of Treece, M.J.) (observing that plaintiff was “requir[ed]” to seek an appeal to the superintendent, even though he never received a response to his grievance of April 26, 2003, which was never assigned a grievance number); *Collins v. Cunningham*, 06-CV-0420, 2009 WL 2163214, at \*3, 6 (W.D.N.Y. July 20, 2009) (rejecting plaintiff's argument that his administrative remedies were not available to him where his grievance of March 20, 2004, was not assigned a grievance number); *Veloz v. New York*, 339 F.Supp.2d 505, 515-16 (S.D.N.Y.2004) (rejecting inmate's argument that the prison's grievance procedure had been rendered unavailable to him by the practice of prison officials' losing or destroying his grievances, because, *inter alia*, “there was no evidence whatsoever that any of [plaintiff's] grievances were filed with a grievance clerk,” and he should have “appeal[ed] these claims to the next level once it became clear to him that a response to his initial filing was not forthcoming”); cf. *Hernandez v. Coffey*, 582 F.3d 303, 305, 309, n. 3 (2d Cir.2009) (“Our ruling in no way suggests that we agree with Hernandez's arguments regarding exhaustion or justification for failure to exhaust [which included an argument that the Inmate Grievance Program was not available to him because, when

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he filed a grievance at the first stage of the Program, he received no response and his grievance was not assigned a grievance number].”).

- 7 The Court recognizes that the Supreme Court's decision in *Woodford v. Ngo*, 548 U.S. 81, 126 S.Ct. 2378, 165 L.Ed.2d 368 (2006), may have changed the law regarding possible exceptions to the exhaustion requirement (and thus the possibility that exhaustion might occur through the disciplinary process). Specifically, in *Woodford*, the Supreme Court held that the PLRA required “proper” exhaustion as a prerequisite to filing a section 1983 action in federal court. *Woodford*, 548 U.S. at 93. “Proper” exhaustion means that the inmate must complete the administrative review process in accordance with the applicable procedural rules, as a prerequisite to bringing suit in federal court. *Id.* at 88-103 (emphasis added). It is unclear whether *Woodford* has overruled any decisions that recognize “exceptions” to the exhaustion requirement. Out of special solicitude to Plaintiff, the Court will assume that *Woodford* has not overruled the Second Circuit's *Giano-Testman* line of cases.
- 8 *Giano*, 380 F.3d at 678 (“[W]hile *Giano* was required to exhaust available administrative remedies before filing suit, his failure to do so was justified by his reasonable belief that DOCS regulations foreclosed such recourse.”); *Testman*, 380 F.3d at 696-98 (remanding case so that district court could consider, *inter alia*, whether prisoner was justified in believing that his complaints in the disciplinary appeal procedurally exhausted his administrative remedies because the prison's remedial system was confusing).
- 9 *Testman*, 380 F.3d at 696-98 (remanding case so that district court could consider, *inter alia*, whether prisoner's submissions in the disciplinary appeals process exhausted his remedies “in a substantive sense” by “afford[ing] corrections officials time and opportunity to address complaints internally”); *Chavis v. Goord*, 00-CV-1418, 2007 WL 2903950, at \*9 (N.D.N.Y. Oct. 1, 2007) (Kahn, J.) (“[T]o be considered proper, exhaustion must occur in both a substantive sense, meaning that prison officials are somehow placed on notice of an inmate's complaint, and procedurally, in that it must be presented within the framework of some established procedure that would permit both investigation and, if appropriate, remediation.”) [citation omitted]. The Court joins the above-described two requirements in the conjunctive because the Second Circuit has recognized that mere notice to prison officials through informal channels, without more, does not suffice to satisfy the PLRA procedural exhaustion requirement. See *Macias v. Zenk*, No. 04-6131, 495 F.3d 37, at \*43-44 (2d Cir.2007) (recognizing that *Woodford v. Ngo*, 548 U.S. 81 [2006], overruled *Braham v. Casey*, 425 F.3d 177 [2d Cir.2005], to the extent that *Braham* held that “informal complaints” would suffice to exhaust a claim).
- 10 See, e.g., *Reynoso v. Swezey*, 423 F.Supp.2d 73, 75 (W.D.N.Y.2006), *aff'd*, 238 F. App'x 660 (2d Cir.2007) (unpublished order), *cert. denied*, 552 U.S. 1207, 128 S.Ct. 1278, 170 L.Ed.2d 109 (2008); *Holland v. James*, 05-CV-5346, 2009 WL 691946, at \*3 (S.D.N.Y. March 6, 2009); *Winston v. Woodward*, 05-CV-3385, 2008 WL 2263191, at \*10 (S.D.N.Y. May 30, 2008); *cf. Muniz v. Goord*, 04-CV-0479, 2007 WL 2027912, at \*5 & n. 23 (N.D.N.Y. July 11, 2007) (McAvoy, J.) (reciting this point of law in context of failure to appeal grievance determination to CORC).
- 11 See, e.g., *Johnson v. Barney*, 04-CV-10204, 2007 WL 2597666, at \*2 (S.D.N.Y. Aug.30, 2007); *Reynoso*, 423 F.Supp.2d at 75-76.
- 12 See, e.g., *Reynoso*, 423 F.Supp.2d at 75 (“There is no evidence that plaintiff was confused or misled about the proper method for raising his claims. In fact, the record shows exactly the opposite: plaintiff did file a grievance about the incident. He simply failed to appeal the denial of that grievance to CORC.”); *Tapp v. Kitchen*, 02-CV-6658, 2004 WL 2403827, at \*9 (W.D.N.Y. Oct.26, 2004) (“In the instant case, however, plaintiff does not and cannot claim to have believed that his only available remedy was to raise his complaint as part of his disciplinary hearing, since he also filed a grievance with the Inspector General, and also claims to have filed both an inmate grievance and a separate complaint with the facility superintendent.”); *cf. Muniz*, 2007 WL 2027912, at \*5 & n. 23 (“Plaintiff's Complaint alleges facts indicating that he believed it necessary to file a grievance with the Gouverneur C.F. IGRC and to appeal the denial of that grievance to the Gouverneur C.F. Superintendent. Why would he not also believe it necessary to take the next step in the exhaustion process and appeal the Superintendent's decision to CORC?”).
- 13 See, e.g., *Petrusch v. Oliloushi*, 03-CV-6369, 2005 WL 2420352, at \*5 (W.D.N.Y. Sept.30, 2005) (“[A]s to his grievance, which is the subject of this lawsuit, plaintiff does not appear to be contending that he believed the Superintendent's denial constituted exhaustion, since by initially claiming that he did appeal to CORC, albeit without proof, he has demonstrated his knowledge of the correct procedure for exhaustion.”).
- 14 See, e.g., *Benjamin v. Comm'r N.Y. State DOCS*, 02-CV-1703, 2007 WL 2319126, at \*14 (S.D.N.Y. Aug.10, 2007) (“Benjamin cannot claim that he believed that appealing his disciplinary proceeding was the only available remedy at his disposal in light of the numerous grievances he has filed during his incarceration at Green Haven [both before and after the incident in question].”), *vacated in part on other grounds*, No. 07-3845, 293 F. App'x 69 (2d Cir.2008).

- 15 See, e.g., *Chavis*, 2007 WL 2903950, at \*9 (“The focus of a disciplinary hearing is upon the conduct of the inmate, and not that of prison officials.... While the mention of a constitutional claim during plaintiff’s disciplinary hearing could potentially have satisfied his substantive exhaustion requirement by virtue of his having notified prison officials of the nature of his claims, he did not fulfill his procedural exhaustion requirement [under the circumstances due to his] ... mere utterance of his claims during the course of a disciplinary hearing .... [T]here is nothing in the record to suggest that when the issues of interference with plaintiff’s religious free exercise rights or alleged retaliation for having voiced his concerns were in any way investigated by prison officials.”) [citations omitted].
- 16 See, e.g., *Colon v. Furlani*, 07-CV-6022, 2008 WL 5000521, at \*2 (W.D.N.Y. Nov.19, 2008) (“Colon was found guilty of harassment based on a letter that he wrote to defendant Bordinaro, concerning some of the events giving rise to his failure-to-protect claim, but it does not appear that he appealed that disposition.... While under some circumstances an inmate may be able to satisfy the exhaustion requirement by appealing from a disciplinary hearing decision ..., plaintiff did not do so here, and this claim is therefore barred under the PLRA.”) [citations omitted]; *Cassano v. Powers*, 02-CV-6639, 2005 WL 1926013, at \*5 (W.D.N.Y. Aug.10, 2005) (“[E]ven assuming plaintiff believed that his proper recourse was to raise [his] complaint at his disciplinary hearing, rather than using the Inmate Grievance Program, he did not exhaust that process. That is, plaintiff has not provided any evidence that he appealed his Tier III hearing conviction. Since plaintiff did not pursue even the disciplinary appeal process, he can not have made submissions in the disciplinary process that were sufficient, in a substantive sense, to exhaust his remedies under § 1997e(a).”) [internal quotation marks and citation omitted].
- 17 See *Hemphill*, 380 F.3d at 686 (describing the three-part inquiry appropriate in cases where a prisoner plaintiff plausibly seeks to “counter” defendants’ contention that the prisoner failed to exhaust his available administrative remedies under the PLRA); *Verley v. Wright*, 02-CV-1182, 2007 WL 2822199, at \*8 (S.D.N.Y. Sept.27, 2007) (“[P]laintiff has failed to demonstrate that the administrative remedies were not, in fact, ‘actually available to him.’ ”); *Winston v. Woodward*, 05-CV-3385, 2008 WL 2263191, at \*10 (S.D.N.Y. May 30, 2008) (finding that the plaintiff “failed to meet his burden under *Hemphill* of demonstrating ‘special circumstances’ ”); see also *Ramirez v. Martinez*, 04-CV-1034, 2009 WL 2496647, at \*4 (M.D.Pa. Aug.14, 2009) (“In order to effectively oppose defendants’ exhaustion argument, the plaintiff has to make a showing in regard to each of his claims.”); *Washington v. Proffitt*, 04-CV-0671, 2005 WL 1176587, at \*1 (W.D.Va. May 17, 2005) (“[I]t is plaintiff’s duty, at an evidentiary hearing, ‘to establish by a preponderance of the evidence that he had exhausted his administrative remedies or that any defendant had hindered or prevented him from doing so within the period fixed by the Jail’s procedures for filing a grievance.’”).
- 18 See, e.g., *Lunney v. Brureton*, 04-CV-2438, 2007 WL 1544629, at \*10 n. 4 (S.D.N.Y. May 29, 2007) (“There is certainly case law that supports the view that exhaustion should be determined by the Court rather than by a jury. As the Supreme Court has recently affirmed, however, exhaustion is an ‘affirmative defense,’ much like a statute of limitations defense. Where there are disputed factual questions regarding an affirmative defense such as a statute of limitations defense, the Second Circuit has stated that ‘issues of fact as to the application of that defense must be submitted to a jury.’ Thus, it is not clear that factual disputes regarding the exhaustion defense should ultimately be decided by the Court.”); *Finch v. Servello*, 06-CV-1448, 2008 WL 4527758, at \*8 n. 5 (N.D.N.Y. Sept.29, 2008) (McAvoy, J.) (citing *Lunney* and noting that “it is not clear that factual disputes regarding the exhaustion defense should ultimately be decided by the Court”).
- 19 See, e.g., *Harrison v. Goord*, 07-CV-1806, 2009 WL 1605770, at \*7 n. 7 (S.D.N.Y. June 9, 2009) (recognizing that “[t]here is authority ... for the position that where questions of fact exist as to whether a plaintiff has exhausted administrative remedies, such fact questions are for the Court, rather than a jury, to decide ....”); *Amador v. Superintend. of Dept. of Corr. Servs.*, 03-CV-0650, 2007 WL 4326747, at \*5 n. 7 (S.D.N.Y. Dec.4, 2007) (“It is unclear whether factual disputes regarding the exhaustion defense should ultimately be decided by the court or by a jury.... [T]here is ... case law ... supporting the view that exhaustion should be determined by the court and not a jury.”), *appeal pending*, No. 08-2079-pr (2d Cir. argued July 15, 2009).
- 20 See, e.g., *Mastroianni v. Reilly*, 602 F.Supp.2d 425, 438 (E.D.N.Y.2009) (noting that the magistrate judge held an evidentiary hearing “on the issue of exhaustion”); *Sease v. Phillips*, 06-CV-3663, 2008 WL 2901966, \*3 n. 2 (S.D.N.Y. July 25, 2008) (finding that “the better approach is for the judge, and not the jury, to decide any contested issues of fact relating to the defense of failure to exhaust administrative remedies.”); *Amador*, 2007 WL 4326747, at \*5 n. 7 (“[T]here is ... case law, which in my view is more persuasive and on point, supporting the view that exhaustion should be determined by the court and not a jury. I find it proper that this issue be decided by the court.”); *Enigwe v. Zenk*, 03-CV-0854, 2006 WL 2654985, at \*4 (E.D.N.Y. Sept.15, 2006) (finding that, at the summary judgment “stage of the proceedings, a genuine question of fact exists with respect to whether [plaintiff] should be excused from exhausting his administrative remedies with regard to claims relating to his confinement at MDC Brooklyn,” and therefore “direct[ing] that a hearing

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be held" before a judge, to resolve this issue); *Dukes v. S.H.U. C.O. John Doe # 1*, 03-CV-4639, 2006 WL 1628487, at \*6 (S.D.N.Y. June 12, 2006) (ordering an "evidentiary hearing [before a judge] on the issue of whether prison officials failed to assign grievance numbers to [plaintiff]'s grievances and, if so, whether that rendered further administrative remedies unavailable, estopped the Defendants from asserting non-exhaustion, or justified [plaintiff]'s failure to appeal to the CORC"); *Mingues v. Nelson*, 96-CV-5396, 2004 WL 324898, at \*4 (S.D.N.Y. Feb.20, 2004) ("The Court could have *sua sponte* dismiss[ed] this action as the record is unmistakably clear that an appropriate administrative procedure was available to him, that he was required to exhaust his administrative remedies, and that he failed to do so as required by the PLRA.... In this case, plaintiff has been afforded notice and given an opportunity to respond to the exhaustion issue and his failure remains clear."); *Roland v. Murphy*, 289 F.Supp.2d 321, 323 (E.D.N.Y.2003) "[W]hether the plaintiff has exhausted his administrative remedies is a question for the Court to decide as a matter of law." [internal quotation marks and citation omitted]; *Evans v. Jonathan*, 253 F.Supp.2d 505, 509 (W.D.N.Y.2003) ("[W]hether the plaintiff has exhausted his administrative remedies is a question for the Court to decide as a matter of law.").

21 See, e.g., *Snider v. Melindez*, 199 F.3d 108, 113-14 (2d Cir.1999) ("Whether an administrative remedy was available to a prisoner in a particular prison or prison system, and whether such remedy was applicable to the grievance underlying the prisoner's suit, are not questions of fact. They either are, or inevitably contain, questions of law. Where administrative remedies are created by statute or regulation affecting the governance of prisons, the existence of the administrative remedy is purely a question of law. The answer depends on the meaning of the relevant statute or regulation."), accord, *Mojias v. Johnson*, 351 F.3d 606, 608-11 (2d Cir.2003) (citing relevant language from *Snider v. Melindez*, and later stating that a district court could *sua sponte* dismiss a prisoner's civil rights complaint for failure to exhaust his available administrative remedies if it gave him notice and an opportunity to be heard); *DeBlasio v. Moriarty*, 05-CV-1143, Minute Entry (N.D.N.Y. filed Dec. 9, 2008) (McCurn, J.) (indicating that judge held pre-trial evidentiary hearing on whether plaintiff had exhausted administrative remedies before filing action); *Pierre v. County of Broome*, 05-CV-0332, 2007 WL 625978, at \*1 n. 1 (N.D.N.Y. Feb.23, 2007) (McAvoy, J.) (noting that "[t]he court held an evidentiary hearing on October 25, 2006 concerning the issue of whether Plaintiff had exhausted administrative remedies"); *Hill v. Chanalor*, 419 F.Supp.2d 255, 257-59 (N.D.N.Y. March 8, 2006) (Kahn, J.) (*sua sponte* dismissing a prisoner's civil rights complaint, pretrial, for failure to exhaust his available administrative remedies after it gave him notice and an opportunity to be heard); *Raines v. Pickman*, 103 F.Supp.2d 552, 555 (N.D.N.Y.2000) (Mordue, J.) ("[I]n order for the Court to dismiss for failing to exhaust administrative remedies, the Court must be shown that such a remedy exists for an inmate beating in the grievance context. This is an issue of law for the Court to determine.").

22 See *Casanova v. Dubois*, 289 F.3d 142, 147 (1st Cir.2002); *Hill v. Smith*, 186 F. App'x 271, 273-74 (3d Cir.2006); *Mitchell v. Horn*, 318 F.3d 523, 529 (3d Cir.2003); *Anderson v. XYZ Corr. Health Servs., Inc.*, 407 F.3d 674, 682-83 (4th Cir.2005); *Dillon v. Rogers*, No. 08-30419, 2010 WL 378306, at \*7 (5th Cir. Feb.4, 2010); *Taylor v. U.S.*, 161 F. App'x 483, 486 (6th Cir.2005); *Larkins v. Wilkinson*, 172 F.3d 48, at \*1 (6th Cir.1998); *Husley v. Belken*, 57 F. App'x 281, 281 (8th Cir.2003); *Ponder v. Wackenhut Corr. Corp.*, 23 F. App'x 631, 631-32 (8th Cir.2002); *Wyatt v. Terhune*, 315 F.3d 1108, 1119-20 (9th Cir.2003), *cert. denied*, 540 U.S. 810 (2003); *Freeman v. Watkins*, 479 F.3d 1257, 1260 (10th Cir.2007); *Alloway v. Ward*, 188 F. App'x 663, 666 (6th Cir.2006); *Bryant v. Rich*, 530 F.3d 1368, 1373-76 (11th Cir.), *cert. denied*, --- U.S. ---, 129 S.Ct. 733, 172 L.Ed.2d 734 (2008).

23 The Court notes that, in his Complaint, Plaintiff also swore that his "grievance was denied." (Dkt. No. 1, ¶ 4.b.ii.) However, during the exhaustion hearing, Plaintiff testified that he never received a response to his grievance from any member of DOCS.

24 In addition, the documentary evidence adduced at the hearing establishes that, in actuality, Plaintiff filed ten other grievances during this time period (and several appeals from the denials of those grievances). The first of these grievances (Grievance Number GM-30651-00), filed on August 25, 2000, regarded Plaintiff's request for medications. (Hearing Exs. D-4, D-5.) The second of these grievances (Grievance Number GM-30691-00), filed on September 1, 2000, regarded Plaintiff's request for copies. (Hearing Ex. D-4.) The third of these grievances (Grievance Number GM-30729-00), filed on September 11, 2000, regarded the use of full restrains against Plaintiff. (*Id.*; see also Hearing Ex. P-14.) The fourth of these grievances, filed on October 19, 2000 (Grievance Number GM-30901-00), regarded Plaintiff's request for the repair of his cell sink. (Hearing Exs. D-4, D-5.) The fifth of these grievances (Grievance Number GM-30901-00), also filed on October 19, 2000, regarded Plaintiff's request for the clean up of his cell. (Hearing Ex. D-4.) The sixth of these grievances (Grievance Number GM-31040-00), filed on November 17, 2000, regarded the review of records. (*Id.*) The seventh of these grievances (Grievance Number GM-31041-00), also filed on November 17, 2000, regarded Plaintiff's request for medical attention. (*Id.*; see also Hearing Ex. P-13) The eighth of these grievances (Grievance Number GM-31048-00), filed on November 20, 2000, regarded the rotation of books. (Hearing Ex. D-14) The ninth of these grievances (Grievance



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Number GM-31040-00), filed on November 27, 2000, regarded the review of records (and was consolidated with his earlier grievance on the same subject). (*Id.*) The tenth of these grievances (Grievance Number GM-31070-00), filed on November 27, 2000, regarded Plaintiff's eyeglasses. (*Id.*)

25 For example, Plaintiff was unable to identify the corrections officers to whom he handed his grievance and appeals for mailing. (*Id.* at 127-34.) Moreover, Plaintiff did not convincingly explain why the grievance and appeals at issue in this action did not make it through the mailing process, while his numerous other grievances and appeals did make it through the mailing process. (*Id.* at 154-171.) In addition, Plaintiff acknowledged that it was his belief, during this time period, that an inmate was not required to exhaust his administrative remedies in matters involving the use of excessive force; yet, according to Plaintiff, he decided to exhaust his administrative remedies on his excessive force claim anyway. (*Id.* at 148-49.)

26 See *Ruggiero v. County of Orange*, 467 F.3d 170, 178 (2d Cir.2006) (holding that defendants were not estopped from asserting the affirmative defense of non-exhaustion where the conduct plaintiff alleged kept him from filing a grievance—that he was not given the manual on how to grieve—was not attributable to the defendants and plaintiff “point[ed] to no affirmative act by prison officials that would have prevented him from pursuing administrative remedies”); *Murray v. Palmer*, 03-CV-1010, 2008 WL 2522324, at \*19 (N.D.N.Y. June 20, 2008) (Hurd, J., adopting Report-Recommendation of Lowe, M.J.) (“I have found no evidence sufficient to create a genuine issue of triable fact on the issue of whether Defendants, *through their own actions*, have inhibited Plaintiff exhaustion of remedies so as to estop one or more Defendants from raising Plaintiff's failure to exhaust as a defense.”) [emphasis in original]; *Shaheen v. McIntyre*, 05-CV-0173, 2007 WL 3274835, at \*16 (N.D.N.Y. Nov.5, 2007) (McAvoy, J. adopting Report-Recommendation of Lowe, M.J.) (finding defendants not estopped from raising Plaintiff's non-exhaustion as a defense based on plaintiff's allegation “that [he] was inhibited (through non-responsiveness) by [ ] unnamed officials at Cocksackie C.F.'s Inmate Grievance Program (or perhaps the Grievance Review Committee), and Cocksackie C.F. Deputy Superintendent of Security Graham” because plaintiff's complaint and “opposition papers ... fail to contain any evidence placing blame on Defendants for the (alleged) failure to address his grievances and complaint letters”); *Smith v. Woods*, 03-CV-0480, 2006 WL 1133247, at \*16 (N.D.N.Y. Apr.24, 2006) (Hurd, J. adopting Report-Recommendation of Lowe, M.J.) (finding that defendants are not estopped from relying on the defense of non-exhaustion because “no evidence (or even an argument) exists that any Defendant ... inhibit[ed] Plaintiff's exhaustion of remedies; Plaintiff merely argues that a non-party to this action (the IGRC Supervisor) advised him that his allegedly defective bunk bed was not a grievable matter.”); cf. *Warren v. Purcell*, 03-CV-8736, 2004 WL 1970642, at \*6 (S.D.N.Y. Sept.3, 2004) (finding that conflicting statements [offered by a non-party]—that the prisoner needed to refile [his grievance] and that the prisoner should await the results of DOCS's investigation—estopped the defendants from relying on the defense on non-exhaustion, or “[a]lternatively, ... provided ... a ‘special circumstance’ under which the plaintiff's failure to pursue the appellate procedures specified in the IGP was amply justified.”); *Brown v. Koenigsmann*, 01-CV-10013, 2005 WL 1925649, at \*1-2 (S.D.N.Y. Aug.10, 2005) (“Plaintiff does not assert that Dr. Koenigsmann personally was responsible for [the failure of anyone from the Inmate Grievance Program to address plaintiff's appeal]. [However,] *Ziemba [v. Wezner]*, 366 F.3d 161 (2d Cir.2004) ] does not require a showing that Dr. Koenigsmann is personally responsible for plaintiff's failure to complete exhaustion [in order for Dr. Koenigsmann to be estopped from asserting the affirmative defense of failure to exhaust administrative remedies], as long as someone employed by DOCS is. If that reading of *Ziemba* is incorrect, however, ... then the circumstances here must be regarded as special, and as justifying the incompleteness of exhaustion, since a decision by CORC is hardly something plaintiff could have accomplished on his own.”).

27 See, e.g., *Sandlin v. Poole*, 575 F.Supp.2d 484, 488 (W.D.N.Y.2008) (noting that “refusal to accept or forward plaintiff's appeals ... effectively render[s] the grievance appeal process unavailable to him”).

28 The Court notes that, even if Plaintiff did (as he testified) hand to a corrections officer for mailing a letter to the Superintendent on September 13, 2000, appealing from the IGRC's failure to decide his grievance of August 22, 2000, within nine working days (i.e., by September 5, 2000), it appears that such an appeal would have been filed two days too late under DOCS Directive 4040, which requires that appeal to be filed within four working days of the IGRC's failure to decide his grievance (i.e., by September 11, 2000). (See Hearing Tr. 127-34; Hearing Ex. P-1, at 5-7 [attaching ¶¶ V.A, V.B. of DOCS Directive 4040, dated 6/8/98].)